IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

La Abra Silver Mining Company, Appellant, vs. The United States.	No. 29.

PETITION FOR A REHEARING.

Come now the appellants by their counsel and move the court that they may be heard again upon the facts, and especially upon the following questions:

I. What was in fact the decision which was made by President Hayes in the investigation of Mexico's charges and evidence (old and new) in respect of La Abra award, in response to the request contained in the fifth section of the act of June 18, 1878; and is it the intention of the court to set this Executive decision aside and condemn the payments which were accordingly made to the Company and its assigns by the President of the United States?

II. On what evidence was the Umpire's decision founded, and what material part of it, if any, has been surcharged and falsified by the new evidence? This

will involve a renewed examination of the letters on which the court has relied in affirming the judgment of the Court of Claims.

Before proceeding to discuss these questions counsel beg leave to make some observations on the history of the claim as given in the opinion of the court, for, as stated in that opinion, it is "in the light of this history of the claim" that the court proceeds "to the consideration of such of the principal questions presented in argument as are essential to the disposition of the case."

The importance of the view which the court takes of the history of the claim cannot be better stated than it has been in the court's own language. If the principal questions have been considered "in the light of this history of the claim" it is of the highest importance that this "light" should be unobscured.

The court seems to accept the view so persistently presented by Mexico's counsel from the beginning, that the United States vouched for La Abra Company's claim, and became responsible for it by transmitting it to the Commission, although in the opinion it is observed that Secretary Fish issued a circular on the 23d day of February, 1870, in which he took care to say that by referring the claims of corporations and citizens of the United States to the Commission, the Government of the United States thereby expressed no opinion either as to the merits of the claims presented, or as to the principles of law to be invoked in their support, and that the responsibility of deciding questions of fact and law rested with the Commissioners.[1]

Notwithstanding this express disavowal by the Government, which could not have been expressed in clearer or stronger terms, the court cites Mr. Chief Justice

[1] Opinion, 2.

Waite's remark from *Frelinghuysen* v. *Key*, that the claimants "induced the United States to assume the responsibility of seeking redress for injuries they claimed to have sustained by the conduct of Mexico," and that "claims presented and evidence submitted to such a tribunal must necessarily bear the impress of the entire good faith of the Government from which they come."[1] The court also cites Mr. Chief Justice Fuller's statement in *Boynton* v. *Blaine*, that "the Government assumed the responsibility of presenting his [Weil's] claim, and made it its own in seeking redress in respect to it;[2] and, referring to the act of 1892, says that in and by it "the United States declares that its citizens shall not through its agency reap the fruits of a fraudulent demand which they had induced it to assert against another country."[3]

But such an assertion of any demand, fraudulent or fair, was the very thing that the Government disavowed; it was not willing to be put in the position of asserting any of the claims, and it accordingly made a formal announcement, before a single claim had been heard by the Commissioners, that it was "not to be inferred from the fact of presentation that the Government thereby expresses *any opinion* upon the *merits* of the claims presented, either *as regards the facts of the case*, which, in most instances, remain to be fully developed before the Commissioners, and *of which the Department therefore cannot judge*, or as regards *the principles of the law* to be invoked in their support." "The responsibility of deciding questions of fact and law," said the Government, by its proper organ, "rests with the Commissioners, but it has been and is the purpose of this Department to interpose no obstacle to the submission of *any claim* with such proofs and arguments in its support as *the claimant* may furnish."[4]

[1] Opinion, 5, 6. [2] *Ibid.*, 9. [3] *Ibid.*, 22. [4] Record, 742, 743.

It is evident that this important and significant announcement of the Government of the United States to the Commission and all concerned had not been brought to the notice of the court when it stated that the Government was seeking "*redress*" for these claimants and had made their claims "*its own.*" The two governments were simply seeking a final settlement of private reclamations, and for that purpose had provided a forum in which their citizens could have their claims, such as they were, against the respective governments examined and determined. On this point it was said by Mr. Daniel, in his report of August 5, 1886, from the Foreign Affairs Committee, upholding the validity of La Abra award:

> "The United States has never undertaken to be themselves the judge of the legitimacy of these claims, nor could they do so. They were a party to the arbitration, not the arbiter. *The legitimacy of the claims was the very question submitted to the court of arbitration under the treaty.*"[1]

In his "Final Report," Mr. J. Hubley Ashton, agent and counsel for the United States, says on this subject:

> "The evidence in the cases of the American claims against Mexico was taken, and the special arguments in those cases on the facts were prepared by the private agents or counsel of the claimants, *the Agent of the United States assuming no responsibility in regard to the proofs.*"[2]

Every civilized government provides municipal courts for the trial of private causes, but vouches for none of them. They are tried on their merits. So it was substantially in this case.

And it was never true that the United States demanded,

[1] Report No. 3474, H. R., 49th Congress, 1st Session, 4.

[2] Ex. Doc. No. 31, Senate, 44th Congress, 2d Session, 15.

as matter of right, over four hundred and fifty millions from Mexico and got four, or that Mexico demanded, as matter of right, over eighty-five millions from the United States and got less than a sixth of one million.[1]

After observing that La Abra Company gave written notice to the Secretary of State on the 17th day of March, 1870, that it claimed from Mexico $1,930,000, and that, subsequently, on June 14, 1870, the Company filed with the Commission a memorial of its claim, stating the amount thereof to be $3,000,030, the court says that "before the case was finally heard the claims were increased to $3,962,000,"[2] and (again) that "before the Commission concluded its labors," the Company "*amended its claim* and fixed it at $3,962,000."[3]

[1] 1017 claims of citizens of the United States against Mexico were submitted to the Commission, amounting in all to $470,126,613.40, of which 186 were allowed, aggregating $4,125,622.20, or less than one per cent.

998 claims of citizens of Mexico against the United States were submitted to the Commission, amounting in all to $86,661,891.15, of which 167 were allowed, aggregating $150,498.41, or less than one-fifth of one per cent.

Over eighty per cent. of the claims on both sides were rejected *in toto*, and the allowances on the other were small compared with the amounts claimed. For example: Evans claimed $60,000 and got $1,000; Rathbone, $100,000 and got $1,000; Warren, $50,000 and got $2,000; Treniss, $54,437.60 and got $500; Giddings, $175,000 and got $33,188; Belden & Co., $314,684.12 and got $53,199.25; Gosche, $126,441.56 and got $15,297.26; La Abra Company, $3,000,030 and got $683,041.32.

The United States Commissioner (Mr. Wadsworth) concurred with the Mexican Commissioner, Mr. Palacio, in dismissing 187 claims of citizens of the United States against Mexico, and with Mr. Zamacona in thus disposing of 350 more of the same kind, making together over half of all of this class that were submitted to the Commission.

By inadvertence the court, in its opinion (p. 2), says that the Commission was organized with Mr. Wadsworth and Mr. Zamacona as Commissioners, but Mr. Zamacona did not become a member of the board till August 19, 1873, more than four years after its organization, and, meanwhile, Mexico had been represented successively by Mr. Palacio and General Guzman.

[2] Opinion, 2. [3] *Ibid*, 42.

But the claim was never amended,[1] and the only foundation for the charge that the amount of the claim was increased by the Company after it had filed its memorial is a calculation that is to be found in the opinion of the Mexican commissioner (Zamacona), in which he computes certain estimates made *arguendo* in the brief of the Company's counsel, which was filed with the Commission on the 3d of April, 1875, shortly before the case was heard by the Commissioners.[2]

This was seized upon by Mexico's agent, General Slaughter, and printed in his so-called "petition" to Congress in the form of a charge that the Company had raised its claim to $3,900,000,[3] and Mexico's counsel have rung the changes on it ever since; but the Company's counsel, in their printed argument before the Commission, really reduced the claim, for the memorial not only claimed $1,000,000 for the value of the mines, machinery, and buildings, but profits at the rate of $1,000,000 *per annum* (in which the value of the ore on the patio seems to have been included); and at the date of the memorial only two years had elapsed since the alleged cause of action accrued. Of the damages, as stated *arguendo* in the brief, *one* million was for "prospective profits" in lieu of seven years' profits at $1,000,000 per annum and $2,000,000 for the "*value of the mines.*"

In the first brief of the claimant's case, filed with the Commission on the 29th of October, 1870, it was said *arguendo:*

> "Now, if these mines with the preparations made were capable of yielding an annual profit of

[1] It is given in Mr. Ashton's Final Report as $3,000,030, the same amount mentioned originally in the memorial; and so also in the argument of the Mexican agent, Avila, before the Commission.

[2] Record, 384, 385. [3] Record, 759.

> $1,000,000, the property could not have been worth less than *ten millions* of dollars to the proprietors."

But that was not an alteration or amendment of the claim, for the brief goes on to say:

> "Inasmuch as the Company has lost the whole of this valuable property, the claim set up in the memorial for $3,000,000 cannot be considered unreasonable or exaggerated."

The learned Chief Justice of the Court of Claims in his dissenting opinion commented on the fact that the case had been argued by the Government in that court as if the "wildly exaggerated demand" of the Company had been allowed by the Umpire. "But such," said he, "is not the award which is now the subject of consideration."[1] The two Commissioners and the Umpire were all of opinion that neither "prospective profits" nor the so-called "value of the mines" should be allowed; and the award included only the actual expenditures of the Company, with an allowance of $17,000 for ores reduced and $100,000 for ores on the "patio," plus interest for designated periods. It is, however, an interesting fact that about twelve years subsequent to the hearing of this case by the Commission the Candelaria mines, which had been tunnelled in the interval (as it was proposed to tunnel La Abra), disclosed a bed of treasure which has yielded more than a million dollars per annum ever since, and the Company has been paying generous dividends on a capital stock of $12,000,000.[2] This was the property at San Dimas in the possession of which the Durango company was protected, according to the testimony of its superintendent (Martin) by sharing the profits with the

[1] Record, 846.

[2] See Appellant's Brief, 299, for a stipulation on this subject, omitted by inadvertence from the Record.

Mexican authorities.[1] His successor (Dahlgren) also testified that they had "found out how to manage and *interest them*"; otherwise (he said), his company "would be compelled to leave like the others, without a doubt."[2]

An award which included neither "prospective profits" nor the estimated "value of the mines" cannot be said to have been "obtained" by claiming both these items; and it was not the intention of the act of 1892, under which this case has been tried, that the Company should suffer any prejudice on account of any claim or evidence submitted on its behalf, unless it was false and fraudulent and the award to some appreciable extent was "obtained" thereby. This proposition will be discussed when we come to consider the evidence on which the Umpire rendered the award.

The court says that "an application was made by the Government of Mexico for a rehearing of the case but a rehearing was denied."[3] This is true, but there were ten such applications to the Umpire in other cases against Mexico, and they were denied also.[4] The Umpire rendered his decision denying these motions on the 20th of October, 1876.[5]

> "Subsequently, [says the court] the Mexican Government, without at all disputing its obligation under the convention of 1868, to comply with the award, placed in the possession of the Secretary of State of the United States certain books, papers, and documents which it alleged had been then recently discovered, and would show that the claim of

[1] Record, 464.

[2] *Ibid*, 99, answer to question 14; see also Birmingham's testimony on this point, answers to 8th, 9th, and 10th interrogatories, Record, 738, 740.

[3] Opinion 3.

[4] Ex. Doc. No. 103, H. R., 48th Congress, 1st sess., 125–128.

[5] *Ibid.*, 128.

> the La Abra Company was not only fictitious and fraudulent but had been supported by false and perjured testimony."

But in the interval much happened of importance in the history of the claim, which is unnoticed in the opinion—probably on the theory, with which counsel does not agree, that Mexico's conduct has nothing to do with the question at issue under the jurisdictional act. Her failure to produce the Company's books and to prosecute her own citizens for perjury, upon whose testimony—like that of Chavarria—the Umpire relied, should be taken as conclusive proof of the falseness of her charges.

It was on the 11th day of January, 1879, that these "books, papers, and documents" were placed by Mexico in the possession of the Secretary of State.[1] But meanwhile Mr. Fish had refused, in his note of December 4, 1876, to Mr. Mariscal, "to entertain the consideration of any question which might contemplate any violation of or departure from the provisions of the convention as to the final and binding nature of the awards, or to pass upon, or by silence to be considered as acquiescing in, any attempt to determine the effect of any particular award."[2] Shortly afterwards (March 29, 1877), when Mr. Evarts was maintaining the same position, the Mexican minister at this capital entered into an agreement in writing with General James E. Slaughter, of Mobile, Alabama, which is part and parcel of the record in this case,[3] and under which he engaged, for a designated percentage of the

[1] *Ibid.*, 444. [2] *Ibid.*, 131.

[3] The whole of the testimony taken by the Senate committee, of which General Slaughter's examination was a part, was offered in evidence by the United States in the Court of Claims, and, in accordance with a stipulation (Record, 854) Mexico's contract with the General was printed in the Appellant's Brief, pp. 9, 10. It is also stated, in substance, in the Record, 434, 435.

award and so much down, "to undertake the proof of fraud in the claim of the La Abra Mining Company against the Mexican Government." Operations were now commenced in Congress, and four hundred copies of each of two pamphlets containing the motions made for a rehearing of the Weil and La Abra cases before the Umpire, with the correspondence between Mr. Fish and Mr. Mariscal, were printed and distributed among members of both Houses.[1] General Slaughter subsequently testified in the Senate investigation that he had charge of Mexico's opposition to La Abra award before Congress and in the Departments; and the United States in this suit, in the Court of Claims, put this testimony of his, and his contract with Mr. Mariscal, and his so-called "Petition to the Senate and House of Representatives," in evidence. In this "petition," which was privately circulated among members of Congress without having been introduced in either House—before any of Mexico's so-called "newly-discovered evidence" was "placed in the possession of the Secretary of State"—General Slaughter asserted that *he* was then "in possession of original books and reports of the said Company and other papers, and he proceeded to give to Congress "a few extracts," which he called "The Story of the Mine," and which, by comparison with the letter-press copy book, have been proved to be garbled and misleading.[2]

One might infer from the court's opinion that "the books, papers, and documents" which Mexico alleged "had been then recently discovered" were submitted at once to the Department of State, as they should have been, but General Slaughter had need of them in the campaign he had started in Congress as "agent of

[1] Ex. Doc. No. 103, H. R., 48th Cong., 1st sess., 154; also Report 27, H. R., 45th Cong., 2d sess., 3, 4.

[2] Appellant's Brief, 205.

Mexico;"[1] and, as already stated, he circulated garbled portions of them in print among members of both Houses, for the avowed purpose of affecting legislation, before a line of them had been submitted to the President or the Secretary of State. Not only so, but this "agent of Mexico," concealing the fact that he had a contingent interest, under his contract with the Mexican Government, in subverting La Abra award, cast reflections in his "petition" upon the Secretary of State, and, by implication, upon the President of the United States, from whom he was, in effect, appealing to the legislative branch of the Government. After quoting a resolution, introduced by Mr. Forney, of Alabama, which declared that international courtesy and justice toward Mexico required the suspension of payment on the Weil and La Abra awards, General Slaughter quoted in his "petition," by way of contrast, Mr. Evarts' declaration in his note of November 6, 1877, to the Chairman of the House Committee on Foreign Affairs, that—

> "These awards, standing on the same footing of finality under the convention with all the others, are awaiting distribution."
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> "Your petitioner (continued General Slaughter) is convinced that there is no principle of law, international or municipal, by which the United States are bound to distribute this money to the perjurers and their abettors in crime; and as legislation is declared to be necessary in the matter, *your petitioner hereby tenders the proof of fraud to Congress*, and prays that a

[1] "The Weil and La Abra awards being before Congress in connection with charges of fraud, General James E. Slaughter, *as agent of Mexico*, printed and circulated freely among the members of both Houses of Congress a pamphlet containing a petition setting up fraud in the awards, and, *inter alia*, extracts, more or less full, from the correspondence in the letter-book, and also copies of certain letters from Exall to Granger." (Brief of Special Assistant to the Attorney General on final hearing in the Court of Claims, 167.)

thorough and impartial investigation of these claims may be had."[1]

This appeal from the Executive to Congress and the circulation of these garbled and deceptive extracts among Members by the agent of Mexico took place prior to the 18th of June, 1878; and, as already stated, the "newly-discovered evidence" was not laid before Mr. Evarts by the Mexican Government till the 11th of the following January.[2]

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[1] Record, 760, 761.

[2] Mexico's criticisms of Mr. Evarts' conduct in this matter may be found in Mr. Romero's long communication of January 25, 1884, to Mr. Frelinghuysen, evidently prepared by counsel, and printed in Ex. Doc. No. 103, to which so many references have been made, pp. 747–781. Referring to Mr. Evarts' reports of August 8 and September 3, 1879, Mr. Romero says: "Notwithstanding that they called for action of Congress, they were not communicated to that body until April 16, 1880, in response to a Senate resolution of February 27." Referring to Mr. Evarts' grounds for refusing to reopen the cases diplomatically, Mr. Romero says [p. 769], that "these grounds were stated so strongly as to amount to *an argument against any investigation whatever.*"

He also complains that the question whether the honor of the United States required such investigation, "once decided by the Secretary in the affirmative, was *reopened and remitted to Congress* without any light to guide its decision."

And on page 773 the Mexican Minister says of the Secretary of State that "he did not regard in his action the principles formerly recognized by his Government and subsequently announced in the decision of the Supreme Court."

"At first" [says Mexico's counsel, speaking through Mr. Romero to Mr. Frelinghuysen, while the convention for a rehearing was pending in the Senate], "he paid no attention to the representations of Mexico as to the fraud in the claims; and even after Congress took the matter into consideration he deprecated investigation, by advising Congress that the motions for rehearing had been denied by the Umpire; and that the two awards stood on the same footing of finality as to the others, and neglecting to state that the proofs of fraud in the one case had been submitted to him in printed form."

> "When the act of June 18, 1878, was passed, giving him ample authority, he declined to enter into diplomatic negotiations for rehearing the two cases.
>
> "Against the remonstrance of Mexico, and, I am constrained to say, against the plain evidence of the facts submitted to him, *he insisted that the charges and proofs in La Abra case related only to fraudulent exaggeration of damages.*"

As this is a suit in equity, and the Mexican Government (from the beginning) has been the party charging fraud, and pecuniarily interested in the result, will not the court's decision—silent as it is in regard to Mexico's conduct—be construed as an invitation to every government hereafter dissatisfied with a money award against it in an international arbitration to do as Mexico has done in this instance?—to employ a citizen of the creditor nation and give him an interest in the amount awarded, contingent upon his success in securing "proof of fraud in the claim," and have him appeal to the legislative branch of his Government as its "petitioner," and flood it with garbled extracts from alleged "newly-discovered evidence" before submitting a line of it to the diplomatic branch of the Government.

Here is the fact in the record, that there was such a contract between General Slaughter and Mexico.[1] His "petition" to Congress is in the record[2]; so is his testimony in regard to his services as Mexico's agent.[3] It is also in the record that one of his first employees, under his contract with Mexico in 1877, was the able and lamented gentleman who soon afterwards became one of Mexico's attorneys[4] and was in the service of the

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[1] Record, 434; [2] *Ibid.*, 754–802.

[3] "Q. Now, General, since this contract, have you had charge of the prosecution of this matter before Congress and in the Departments?—A. Yes, sir.

"Q. And still have charge of it, have you?—A. Yes, sir.

[4] "Q. Now, state whether you have employed persons to assist you in that matter.—A. Yes, sir. I employed Mr. Lines to assist me.

"Q. When?—A. I employed Mr. Lines soon after signing the contract. (Report No. 2705, Senate, 50th Cong., 2d sess., 914.)

On November 5, 1878, Mr. Zamacona introduced Mr. Robert B. Lines as one of the professional advisers of the Mexican legation in the preparation of the proofs in the Weil and La Abra cases to the Department of State. (Ex. Doc. No. 103, H. R., 48th Cong., 1st sess., 192.)

United States as special assistant to the Attorney General in this suit, in the Court of Claims, when he died.

Not only was the "newly discovered evidence" not filed with Mr. Evarts till garbled portions of it had been used in Congress, as we have said, but, when it *was* filed, Mexico withheld the Company's books of account, and intimated to Mr. Evarts that they had been kept in New York, and could have been submitted by the Company to the Commission,[1] although Mr. Gaona, representing the Mexican Government, had received them at Mazatlan a year previously, through Granger, by carrier, from San Dimas.[2]

"The books of the Company," it was alleged in the printed "Case of Mexico," enclosed with Mr. Zamacona's note of November 11, 1878, to Mr. Evarts, "*were not brought from its headquarters in New York*, nor were any extracts given from them to show its receipts from sales of stocks or other sources, or its expenditures,"—*i. e.*, in the case before the Commission. When that was written, Mexico had these books of account in her possession, and knew that they had never been in New York, but had been kept at the Company's works in Tayoltita. Nevertheless, she withheld them from Mr. Evarts, as she afterwards did from the Senate when the treaty for a rehearing was under consideration, and from all the committees in Congress that subsequently dealt with the subject. Why? Because they showed (*a*) the Company's expenditures substantially as allowed by the Umpire; (*b*) the amount taken from "Scotty" and charged, as stated in Bartholow's testimony, to "robbery account;" (*c*) the credit given to Clark for the "tribute" which he paid to General Guerra for the release of the Company's

[1] Ex. Doc. No. 103, H. R., 48th Cong., 1st sess., 197.

[2] Record, 576, 577.

supply train in June, 1867, thus strengthening his testimony in other particulars; (*d*) the receipts from the mint at Durango, proving the falsity of the letter-press copies of Exall's letters, on which Mexico has always relied, and on which the judgment in this case is founded; (*e*) the fine paid for Exall's release from the pesthouse, substantiating the testimony as to his imprisonment; and (*f*) the mutilation of General Bartholow's journal, nearly half of which is torn away, destroying we know not what entries or memoranda. It seemed to be the intention of the Mexican Government, at first, not to withhold these books and papers, for Mr. Zamacona said in his note of June 20, 1878, to Mr. Evarts that "the undersigned would fail to perform his duty if he did not lay *all* this evidence before the Department of State." But before the following January, when Mexico filed her evidence in the Department, she had taken another resolve.

It does not appear from the court's opinion that Mexico was ever in possession of these books, or that she withheld them for so many years, or that she was at last compelled to produce them in this suit, or that they have such a material bearing on the question of fraud or or no fraud, which Congress has submitted to the court for its decision, and which the court has decided against the Company.

This is a suit in equity; and Mexico is not only the moving party originally, but the party who has maintained the attack upon the award from 1877 until now. It is to Mexico that the undistributed portion of Sir Edward Thornton's award is to be returned; and yet the court has entirely ignored her conduct in the history of the claim, and (so far as appears) in the decision of the case, *even when her conduct* (as it seems to counsel) *involves the truthfulness of her charges and the credibility of her evidence.*

How came it that these books were introduced into this case after Mexico had been withholding them for sixteen years, and meanwhile charging the Company with having concealed or destroyed them.?[1] One of Mexico's counsel (the late Mr. Robert B. Lines), who was also "special assistant to the Attorney General," in charge of this suit on the part of the United States, gave notice (in this latter capacity) on the 5th of June, 1894, to the Company's solicitor "to produce the originals of all books kept by the Company or its officers or agents from the year 1865 to 1868, inclusive[2]," although the Mexican Government had obtained from Granger in December, 1877, and January, 1878, all the books and a selection of the papers and records of the Company that had been kept at Tayoltita, and had been abandoned there with the rest of the Company's property in the spring of 1868. To this demand the Company's solicitor replied:

> "In regard to the books and records, letters and correspondence of the Company that were kept in its office at Tayoltita, defendant says that they were left at that place by the defendant's last superin-

[1] The following is from Colonel De Lagnel's examination in the Senate investigation, September 28, 1888, when the books in question had been for more than ten years in the possession of the Mexican Government:

"Mr. WILSON. I assert this: that the books and papers of this Company went into possession of the Mexican government, just as they got these letters that we have seen here. They were left there at the hacienda as a part of the record in this case and the Mexican government got possession of them.

"Mr. LINES. *That is denied.*" (Rep. No. 2705, Sen., 50th Cong., 2d Sess., 47.)

"By Mr. FOSTER. * * * State what record, if any, was contained in any of the books of the Company in your charge of any loss of mules or supplies by seizure by the Mexican authorities previous to your arrival.

"Mr. WILSON. That calls for the contents of books?

"Mr. FOSTER. Yes; *books which we cannot get and do not know anything about.*" (*Ib.*, 66.)

[2] Record, 461.

tendent (Exall), when he abandoned the defendant's property in February or March, 1868, and that since that time neither the defendant nor any of its officers or agents has had possession or control of such books or records, or any of them, except the exhibits attached to Granger's deposition, taken on defendant's behalf May 14, 1870, and subsequently submitted to the United States and Mexican Claims Commission."

Mr. Lines seems to have been so impressed with the Company's response that when he went to San Francisco in the fall of 1894 to take the depositions of certain witnesses who had come up from Mexico, he made inquiries and obtained information which led him to request the Mexican consul general (Mr. Alex. K. Coney) at San Francisco to telegraph to the Mexican government, with the result stated in Mr. Coney's testimony, which was taken about two weeks later:

"Q. Mr. Coney, do you know anything of books purporting to have been kept by La Abra Silver Mining Company at its hacienda at Tayoltita, Mexico, from 1865 to 1868?—A. Yes, sir.

Q. What do you know concerning them?—A. I asked my Government to send them here to me.

Q. How and when did you ask?—A. *I telegraphed for them on the 1st or 2d of October.*

Q. Did you do this of your own motion or request of any one?—A. I *did it at your suggestion.*

Q. Did you receive those books?—A. I did.

Q. Have you them with you?—A. Yes, sir.

Q. When did you receive them?—A. On the 12th of this month.

Q. By what means?—A. By Wells, Fargo & Co.'s Express." (Record, 565.)

Mr. Coney and Mr. Gaona were examined as witnesses for the United States at San Francisco on the 13th of October, 1894, by Mr. Lines, and it is evident that he

had ascertained from Mr. Gaona, prior to his examination, that he had obtained the Company's books of account from Granger as well as the press-copy book and Garth's and Exall's original letters. Mr. Lines perhaps suspected from the response which the Company's solicitor had made to the demand for the Company's account books, that Gaona would be closely cross-examined in regard to everything he got from Granger in the way of documentary evidence, and so he sagaciously determined, when he had ascertained the facts from Gaona, to request the consul general of Mexico to telegraph to the Mexican government to send up all the books and papers which it had received from Granger. Mr. Lines was detained a long time in San Francisco. He examined Sundell at that city on the 2d of October and, as appears from the testimony, it was on that day or the day next preceding that Mr. Coney telegraphed to the Mexican government for the books, which arrived on the 12th, and were put in evidence, as we have seen in his examination on the 13th of October, 1894.

It will be shown more in detail, further on, how these books, so long withheld and introduced at last, as aforesaid, in this suit, corroborate the testimony upon which the Umpire evidently relied in rendering his award, and expose the untruthfulness of those letters of Exall's on which this court seems to have relied in deciding that the award was obtained by fraud.

The court says:

> "That the La Abra Company ceased to work its mines in Mexico and practically abandoned them is undoubtedly true. But is it true that they did so in consequence of violence and outrages committed against it by the public authorities of the Republic of Mexico? The United States insists upon a negative answer to this question."[1]

[1] Opinion, 25.

But should the United States insist upon a negative answer to this question? The United States, acting legislatively, in the jurisdictional act of December 27, 1892, insists that it shall be judicially determined in its courts—

> "*Whether* the award made by the United States and Mexican Mixed Commission in respect to the claim of the said La Abra Silver Mining Company was obtained as to the whole sum included therein, or as to any part thereof, by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the said * * * Company, or its agents, attorneys, or assigns."

Now, because the Attorney General, to raise this issue, has alleged such fraud in his bill, can it be said that the United States insists that the award *in toto* was so obtained? Congress did not allege such fraud, but left it to be judicially determined; and, as we have shown, the President after investigating the same charges, on the same evidence, in response to the original act of Congress, to which the present jurisdictional act is expressly supplemental, decided that the Company had a valid claim and that the honor of the United States required that any further investigation should be confined to the alleged fraudulent exaggeration of the damages. Thus the legislative and executive branches of the Government have acted in this matter. And, if the action of Congressional committees is considered, it will appear that the only committee that ever heard the case argued, in full sessions, on the evidence, old and new, decided—ten to three—in favor of La Abra award in its entirety. And the report of the Senate committee in favor of the bill (now the jurisdictional act) was disapproved by the Chairman, Mr. Sherman, and severely criticised for material errors of fact in a minority report by Senator Brown, who had been a member of the subcommittee

that conducted the investigation authorized by the resolution of August 30, 1888. Both of these Senators were in favor of an exact performance of the award. And in the last report which was made prior to the passage of the bill, the House Committee on Foreign Affairs, instead of insisting that the award had been obtained by fraud, declared that it "did not intend to impugn the integrity of the persons connected with the Company, *nor constitute an opinion on the merits of the case.*"[1]

If it is said that prior to the decree in this suit the United States insisted that the award had been obtained by fraud, it can only be so by reason of Mr. Attorney General's allegations in the bill of complaint. But the specifications of fact in the bill, thirty in number, taken almost bodily from the "Case of Mexico," prepared by her counsel and enclosed with Mr. Zamacona's note of December 11, 1878, to Mr. Evarts,[2] were discussed seriatim, and the utter and often absurd falsity of the mass of them—and all of them that were material—demonstrated in Appellant's Brief, pp. 261–359. If it be said that that the United States insisted in the XVth paragraph of the bill that the company, its witnesses, agents, attorneys and assigns had all committed fraud and perjury, two things are to be remembered: (*a*) that the only survivor of the attorneys so denounced, Mr. S. S. Ely, an old and honored member of the New York bar, long retired from practice, said of that paragraph when it was read to him on the witness stand under his oath in this suit: "It is an outrageous and infamous lie, so far as we are concerned. That is the only way I can characterize it;[3]" and (*b*) that the bill of complaint

[1] Report No. 1143, H. R., 52d Cong., 1st Sess., 8.

[2] Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 201, 202.

[3] Record, 658.

was prepared by Mexico's counsel, Mr. Robert B. Lines, who, upon the passage of the jurisdictional act for which he had labored so long and so devotedly, was appointed special assistant to the Attorney General and put in charge of the prosecution of this suit. His admissions in the Senate investigation of some of his prior false charges, and the flat denial of others by a witness (Elder) examined on behalf of Mexico, were printed in the Appendix to Appellant's Brief, LVIII–LXXIII, and need not be repeated here.

But as the facts are so voluminous and involved—requiring, as a learned Senator said, when the case was before the Senate, at least two weeks for their proper presentation to a jury—we beg the court, in the name and for the sake of justice, to read what the United States said in its bill of complaint in denial of the imprisonment of the superintendent, and what the evidence shows on that subject, as stated on pages 300–308 of Appellant's Brief.

Take a single illustration of another sort: the United States, in its bill of complaint—the purpose of which was to subvert an international award—alleged that *the only reduction of ore at the mills comprised ninety tons, and was made in August, 1867.*[1] The falsity of this statement was shown so conclusively in the Court of Claims from the books so long withheld by Mexico, and at last introduced as aforesaid in this suit, that Mexico's distinguished counsel (Mr. Foster), who had also appeared in the case as "special assistant to the Attorney General," made the following admission:

> "My industrious friend, the respondent's counsel, has ransacked the pile of account books introduced in this suit, and the net result is that he finds four items, and only four, which would seem to have

[1] Record, 17.

> been the silver product of the mill from the time it was put in operation up to the departure of Exall, in February, 1868, a period of ten months."

This is one way of admitting that instead of a single run at the mills, as falsely alleged by the United States in its bill, there had been at least four separate reductions, as shown by the entries of the returns from the mint at Durango. These are the books for which, as already stated, Mr. Lines telegraphed to Mexico when he ascertained that they had been in possession of the Mexican Government since 1878, and counsel for the United States and Mexico seem to have put them in evidence *en masse* without examining them to see whether they supported or disproved the allegations of the bill. For it is inconceivable that any one authorized to act in the name of the United States would make a solemn allegation of fact or allow it to stand, in such a momentous controversy, knowing it was untrue.

The court also says that the United States insists that it was "a pure afterthought" on the part of the Company "to attempt by the agency of the United States to fasten upon Mexico responsibility for the losses incurred by the Company in the abandonment of its mining property."[1] But "the newly-discovered evidence" shows that as early as August 10, 1867, six months before the abandonment, Garth gave Exall instructions, in case the Company was compelled to abandon its property, "to take all necessary and legal measures, by protest and otherwise, to secure our claim against the Government."[2] This was afterwards done in the very way the Department of State would have instructed the Company to proceed; *i. e.*, by appealing to the highest authority in the State for protection against the illegal interferences and oppressions

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[1] Opinion, 25.

[2] Record, 286.

of the local authorities. The claim would not have been expedited if the Company had appealed to its own Government, for it is a matter of history that Mr. Seward was not willing to press individual claims diplomatically upon Mexico while she was struggling to maintain her independence.[1] Besides, it was known all over the country when the Convention of July 4, 1868, was at last concluded; indeed, it was printed in full in the New York *Herald* early in August, and its substance was published broadcast by the press. The evidence shows that General Bartholow came on from Saint Louis to New York in the summer of 1868, a month or two after Exall's return, and that he collected subscriptions from the Western stockholders to meet the expenses of prosecuting the claim, and wrote to Garth, and engaged General Adams to go to Mexico as the Company's agent in the fall of 1869.[2]

We come now to the questions on which we desire to be reheard:

I.

What was in fact the decision made by President Hayes in the investigation of Mexico's charges and evidence (old and new) in respect to La Abra award and in response to the request contained in the 5th section of the act of June 18, 1878? And is it the intention of the Court to set this Executive decision aside and condemn the payments which were accordingly made to the Company and its assigns by the President of the United States?

The court says that "pursuant to the direction of President Hayes the investigation required by the fifth section

[1] Foreign Relations, 1867, part II, p. 445, *et seq.*

[2] Record, 173, answer to question 19; also 718, 719.

of the act of July 4th [June 18th], 1878, was made by the Secretary of State";[1] and that "having reviewed all the proceedings of the Commission * * * Secretary Evarts referred to the contention that in deciding against opening those awards diplomatically and re-examining them by a new international commission, the whole discretion vested in the Executive as a part of the treaty-making power and under the special provisions of the act of Congress was exhausted, and that the payment in the cases referred to should be no longer suspended."[2] But this "contention" was subsequent to the President's decision.

The court also cites Mr. Evarts' statement that "a solicitous attention to the rights of the claimant and the duty of the executive in the premises had confirmed him in the opinion that Congress should determine whether 'the honor of the United States' required any further investigation in these cases or either of them, and provide the efficient means of such investigation if thought necessary."[3] But this statement refers (so far as the decision in La Abra case was concerned) to the question whether any further investigation should be made when the President had decided that La Abra Company had a valid claim, and that nothing remained for further investigation but the alleged exaggeration of damages.

The court also makes other citations from Mr. Evarts' report of April 13, 1880, and says that "the suggestions of the Secretary having been approved by the President, the first, second, and third installments received from Mexico on account of the claim of the La Abra Company, amounting to $138,565.52, were paid to the representatives of the Company." But these "suggestions of the Secretary" were made *after* the decision and *after*

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[1] Opinion, 4. [2] Opinion, 4. [3] Opinion, 4.

the payments had been made, and the court does not state anywhere in the opinion what the conclusions of Mr. Evarts and the decision of President Hayes in regard to La Abra award actually were.

The report from which the court cites was made to the President by Mr. Evarts on April 13, 1880, more than seven months after his special report and the President's decision on La Abra award. This special report on La Abra award, of which the court takes no notice whatever, was made to the President on the 3d of September, 1879, and was formally approved by him in writing on the 5th of the same month. On the 9th of the same month the Mexican government filed a motion for a reconsideration of this decision,[1] and on the 17th the President made payment to the Company of its share of the three installments that had been received from Mexico on account of the award.

This Executive decision of September 5, 1879, was communicated the next day by the Department of State to Mr. Zamacona, the Mexican Minister at Washington,[2] word for word, as follows:

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[1] This motion was entitled "Motion of Counsel for Mexico for Reconsideration of the *Decision* authorizing a Partial Payment of the Award to said Company"; it was signed by Jno. A. J. Creswell and Robert B. Lines, and it is printed in Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 583–586.

[2] DEPARTMENT OF STATE,
WASHINGTON, *September* 6, 1879.

SIR: I have the honor to communicate to you herewith, in accordance with the directions of the President, a statement of the conclusions reached in the matter of the La Abra Silver Mining Company award, under the convention of July 4, 1868, with Mexico, upon the point reserved for further consideration in the paper sent to you on the 20th ultimo. A copy of the statement has been furnished to the counsel for both parties in the case.

I profit by this occasion, sir, to again assure you of my very high consideration.

W. HUNTER,
Acting Secretary.

Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 582.

"*To the President:*

"SIR: The parties interested in the case of the La Abra Mining Company having desired from you a further consideration of the point reserved in my former statement to you of my views in that case, and the matter having been referred to me to that end, I respectfully submit my conclusions on that point.

"1. Upon a renewed examination of the matter as laid before me by the Mexican government, I am confirmed in the opinion that the proper limits of the further consideration which the honor of the Government should prompt it to give to this award should confine the investigation to the question of a fraudulent exaggeration of the claim by the parties before the Commission, to which, under the provision of the convention, it was presented by this Government.

"2. Upon a careful estimate as to any probable or just reduction of the claim from further investigation should Congress institute it, and under a sense of the obligation of the executive government to avoid any present deprivation of right which does not seem necessary to ultimate results, I am of opinion that its distributive share of the installments thus far received from Mexico may properly be paid to the claimants, reserving the question as to later installments.

"If this conclusion should receive your approval the payment can be made upon the verification at the Department of State of the rightful parties to receive it.

"WM. M. EVARTS.

"September 3, 1879.

"Approved:

"R. B. HAYES.[1]

"September 5, 1879."

This is the Executive decision of September 5, 1879,

[1] Ex. Doc. No. 102, H. R., 48th Cong., 1st Sess., 582, 583.

followed by payment of $138,565.52 to the Company on the 17th of the same month, to which the attention of the court was invited in paragraph II of the Appellant's Brief, pp. 47–87, with authorities sustaining the proposition (pp. 64–66) that the President's action in the premises could not be reversed, reviewed, or ignored by the courts.

This was one of the points on which the learned Chief Justice of the Court of Claims based his dissent from the opinion of the other judges:

> "In 1879 (he said) the diplomatic organ of the American Government, the Secretary of State, '*upon a renewed examination of the matter as laid before him by the Mexican government*,'[1] decided '*that the proper limits of the further consideration*[1] which the honor of the Government should prompt it to give to this award *should confine the investigation to the question of a fraudulent exaggeration of the claim.*'[1] In other words, the Secretary of State decided that the acts of the Mexican officials to these American claimants were such as rendered the government of Mexico responsible from an international point of view. This decision is rendered unequivocal and unquestionable by the fact that the President, upon recommendation of the Secretary, then proceeded to deal with the claim upon the basis that the responsibility of Mexico for the acts and inaction of its officers was a question finally settled. He did this by paying out a portion of the award to the claimants and withholding only enough to meet the charge of fraudulent exaggeration."[2]

How the President's action was understood by Mexico at the time is apparent in the first sentence of her counsel's motion of September 9, 1879, for a rehearing:

> "The undersigned, counsel for Mexico, have the honor to acknowledge the receipt of the Depart-

[1] The italics are the Chief Justice's. [2] Record, 843.

ment's letter of the 6th instant, transmitting the conclusions of the Secretary, dated at Windsor, Vt., on the 3d, and *approved by the President on the 5th instant, authorizing the distribution of the installments already paid by Mexico to the credit of the award in favor of La Abra Mining Company*, ON the GROUND *that the charges preferred by Mexico, and the proofs submitted in support thereof*, TEND ONLY *to establish a 'fraudulent exaggeration' of the claim of that Company;* and that upon a 'careful estimate as to any *probable* or *just* reduction of the claim from further investigation,' which, it had been determined by the decision of the Secretary, dated August 20, to recommend to Congress, it is not supposed that the alleged right of the claimant to the amount now in hand (nearly $150,000) would be affected by the result of such investigation." [1]

Regarding this decision it was held by the Judiciary Committee of the Senate, in a unanimous report, dated June 20, 1880, which was adopted by the Senate *nemine contradicente*, that "*it virtually determines the question submitted to the Executive Department by the said fifth section, so far as that claim (La Abra Company's) is involved.*" [2]

In consequence (June 12, 1880) the Foreign Affairs Committee, which had reported in favor of an investigation by the Court of Claims, asked leave to withdraw its report and the accompanying bill from the further consideration of the House, and by unanimous consent it was so ordered.

It is reasonable to infer from the unanimity, cogency, and earnestness of the Judiciary Committee's report and its adoption by the Senate, that one of the reasons why the convention for a rehearing of the Weil and La Abra claims afterwards failed to receive the necessary majority

[1] Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 583.

[2] For further extracts from this report, see Appellant's Brief, 21, 22.

was that it ignored the fundamental distinction which President Hayes had made between the two cases, and would, if ratified, have overruled his decision that "the proper limits of the further consideration which the honor of the Government should prompt it to give to this award should confine the investigation to the question of a fraudulent exaggeration of the claim."

Shortly after the rejection of the convention for a rehearing, Mr. Edmunds, for Mr. Morgan, made a report from the Senate Committee on Foreign Relations (July 7, 1886) in which, with other references to President Hayes' decision, it was said:

> "Notice being given to the Mexican Minister and to counsel on the 20th of August of this decision, further argument was heard, and a supplementary decision was made September 6 [5,] 1879, to the effect that in La Abra case the investigation should be confined to the question of a fraudulent exaggeration of the damages, and that the two [three] installments up to that time paid in by Mexico might safely be distributed to the claimants, reserving the question of fraud as to later installments. The Mexican Minister protested against this construction and maintained that the charge and evidence submitted by him went to the root of the claim. No reply was made to the two notes of the Minister on this point, and on the 17th of September, 1879, the two [three] installments were paid to La Abra claimants."[1]

This is the report from which the court makes a citation on the eighth page of the opinion, closing with the statement that these claimants have no vested rights entitling them "to demand the payment of *any part* of these awards that are the outgrowth of fraud and perjury."

[1] Report 1454, Senate, 49th Congress, 1st Session, 6.

Mr. Evarts well understood from the outset that Mexico claimed that the award in its entirety had been obtained by fraud, for he had been furnished with a copy of General Slaughter's petition, and Mexico's counsel (Mr. Lines) in his opening argument (May 10, 1879) had said to the Secretary:

> "We absolutely deny, and Mexico has always denied and has never admitted what is artfully insisted upon, that the question is one of damages which Mexico ought to pay."[1]

After Mr. Evarts' original decision of August 8th, in which he made the radical distinction between the two cases, and proposed to the President, if he approved, to make a supplemental report on the case of La Abra, Mr. Zamacona sent a note to Mr. Evarts (August 25, 1879) reiterating Mexico's claim that the whole of the award had been obtained by fraud,[2] and Mexico's counsel filed a protest or "supplemental brief," dated September 1, 1879,[3] insisting on this contention, and it was doubtless on account of this insistence that Mr. Evarts commenced the statement of his final conclusions in La Abra case with these significant words:

> "1. Upon a *renewed* examination of the matter, *as laid before me by the Mexican government*, I am *confirmed* in the opinion that the proper limits," &c., &c.

Mr. Hunter's note of September 6, 1879, written, as he said, by direction of the President, and enclosing a copy of Mr. Evarts' conclusions, approved in writing by the President (*supra*), was an answer to Mr. Zamacona's note

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[1] Ex. Doc. No. 103, 48th Congress, 1st Session, H. R., 451.

[2] Ex. Doc. No. 103, H. R., 48th Congress, 1st Session, 572.

[3] *Ibid.*, 573–581.

of August 25, and any other note or argument on the same subject of a date prior to the final decision.

This decision was recognized as being still in effect on the 5th March, 1888, the date of Mr. Bayard's second report on the two cases to the President, and communicated by him to Congress, in which he referred to the fundamental distinction made between them in 1879, as follows:

> "Nor can the payment by Mr. Evarts of certain installments of La Abra award be regarded as inconsistent with his recommendation in that case, since the allegations of fraud in relation thereto affect only the measure of damages and not, as in the Weil case, the question whether any ground of claim ever existed."[1]

It will be noticed that Mr. Bayard does not make this statement as a citation of an opinion or decision by a previous Administration, perhaps open, after a lapse of nine years, to question, but as an effective determination binding on him and all concerned—"since (he says, speaking in the present tense), the allegations of fraud in relation thereto affect *only* the measure of damages, and *not*, as in the Weil case, *the question whether any ground of claim ever existed.*"

So serious an obstacle was this in Mexico's path and so anxious was her distinguished counsel to overcome or evade it, that in his argument on the bill (now the jurisdictional act) before the House Committee on Foreign Affairs in the spring of 1892, he made the following statement (italics ours):

> "Claimants assert that Secretary Bayard took the same view as Mr. Evarts. What Secretary Bayard did do *in the first instance* was simply to follow the conclusions reached by Secretary Evarts. *It is to be*

[1] Ex. Doc. No. 109, Senate, 50th Cong., 1st Sess., 6.

noted, however, that this expression was only made in Secretary Bayard's first report on the subject. The treaty was rejected April 21, 1886, and on May 11, 1886, President Cleveland sent his message to Congress, and there was manifestly little opportunity afforded the *new* chief of the State Department to examine in detail the long documentary history of the case. *But two years afterwards, when sufficient time had elapsed for the thorough examination of the matter,* President Cleveland sent his second message to Congress, March 5th, 1888. Mr. Bayard's report accompanying this message bears no uncertain tone, *nor does it repeat the conclusion of Mr. Evarts on this point, though free quotations are made from his report.*"[1]

But it was in Mr. Bayard's earlier report (May 11, 1886) that he failed to state either the radical distinction made by President Hayes between the two cases on the merits, or the fact that payment was made in the one case and withheld in the other; and it was in his later report of March 5, 1888, "when (as Mr. Foster suggested) sufficient time had elapsed for the thorough examination of the matter," that he referred to Mr. Evarts' conclusions, approved and acted upon as they had been by President Hayes, as the law for La Abra. It thus appears that the facts are just the reverse of those stated by Mexico's counsel [redacted] to the committee.

Now we come to the time when in the lapse of years this Executive decision of September 5, 1879, seems to pass into oblivion. The Senate report of March 1, 1889, in favor of the bill (now the jurisdictional act) stated the conclusions of Mr. Evarts and the action taken by President Hayes, under the fifth section of the act of June 18, 1878, as follows:

"In accordance with the provisions of this sec-

[1] Mr. Foster's printed argument, 15.

tion, the President (Mr. Hayes) caused an investigation to be made of the charges of fraud preferred by the Mexican government, and Mr. Evarts, then Secretary of State, made a careful examination of the newly-discovered evidence presented by Mexico, and submitted his conclusions thereon to the President August 12, 1879, to the effect:

> "'That the honor of the United States does require that these two cases should be further investigated by the United States to ascertain whether this Government has been made the means of enforcing against a friendly power claims of her citizens based upon or exaggerated by fraud.'
>
> "But was of the opinion that any agreement with Mexico for the opening of the awards would involve the admission by the United States that the results of the convention were not final and conclusive between the two governments.
>
> "President Hayes adopted the views of Secretary Evarts, and, in communicating his report to Congress, recommended that legislation should be enacted providing for the further investigation of these claims by some domestic tribunal."[1]

There is nothing further in that report on this subject. Although the report was made upon a bill for a judicial examination of La Abra award, by way of amendment and enlargement of the act of June 18, 1878, it entirely misrepresented the proceedings which had been taken by the President under that act. It not only concealed the distinction which Mr. Evarts had made in his first report to the President between the Weil and La Abra cases, but suppressed his supplementary report upon La Abra case altogether. Not only so, but it imputed an opinion to Mr. Evarts which he never expressed, in regard to the effect of "any agreement with Mexico for the opening of the awards," and then it stated that the President adopted the views of Mr. Evarts and, in communicating his report to Congress, recommended certain

[1] Report 2705, Senate, 50th Cong., 2d Sess., pp. III & IV.

legislation which he never, in fact, recommended. The President made no recommendation whatever in transmitting Mr. Evarts' report to Congress. The executive investigation and decision, so far as La Abra award was concerned—and that was the subject of the committee's report—could not possibly have been more materially or adroitly misrepresented to Congress.

Proceeding with its astounding concealments and perversions, the report states (after referring to the action of the Senate Judiciary Committee in 1880) that "Congress having adjourned without making any provision in reference to La Abra and Weil awards, *President Hayes, in the absence of Secretary Evarts, directed the Assistant Secretary of State to distribute to the claimants the installments which had been received and were then undistributed.*"

But we know that the President paid, on the 17th of September, 1879, to La Abra Company and its assigns its share of the installments then on hand, though he withheld payment on the Weil award till 1881.

The object of this report was to get rid of the President's decision and the consequent responsibility of the Mexican government to La Abra Company. It makes a citation from Mr. Bayard's report of March 5, 1888, in regard to the "two cases," but conceals his reference to the fact that it had been determined by the President that La Abra Company had a valid claim against Mexico, and that "the allegations of fraud in relation thereto affect only the measure of damages, and not, as in the Weil case, the question whether any ground of claim ever existed." All this was in preparation for a finding which would not seem to be incompatible with any previous decision of the Government of the United States in the premises, and this finding was that the newly-discovered correspondence was "sufficient, considered alone, to show the whole claim of the Company to be

fraudulent, and the claimant's testimony before the Mixed Commission to have been rank perjury." This is the report from which the court makes a citation to the same effect on pages 8 and 9 of the opinion.

So bent was this report on getting rid of the President's decision and Mexico's established responsibility that it declared that the evidence did not show that Exall was actually imprisoned, in face of the testimony of Mexico's witnesses and the assertion of the Mexican Commissioner himself to the contrary.

But the most outrageous and mischievous misstatement of all in this remarkable document is that the Umpire's remark, made in his denial of the motion for a rehearing, namely—that he doubted "whether the government of either country would insist upon the payment of claims founded upon perjury"—referred "*to the newly-discovered evidence in La Abra Claim.*"[1]

When these words were penned it had been established beyond doubt by communications from the Mexican government (as well as from the original motion and its denial) that not a scintilla of "newly-discovered evidence" was before Sir Edward Thornton when he denied the motion for a rehearing;[2] and we know now exactly how, when, where, and from whom the so-called "newly-discovered evidence" was obtained. Not a line of it came into possession of the Mexican government prior to December, 1877—more than a year after the Umpire had refused to reopen the case.

The ostensible author of the report was not a man to vary a hair's breadth knowingly from the truth. He could not possibly have intended to give Congress the idea that what the Umpire said about perjury—in the

[1] Report 2705, Senate, 50th Cong., 2d Sess., XV.

[2] Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 144, note by the Mexican agent; 201, 759.

admonition which he administered to the Mexican agent—applied to new evidence impeaching the award, when no such evidence was before him.[1]

But in spite of all these perversions and misrepresentations, President Hayes' decision, as it was actually made in 1879 and practically sustained by the Senate in the rejection of the convention for a rehearing, and subsequently restated by Mr. Bayard in 1888, was drawn into the jurisdictional act by the recital in the preamble, and that act is qualified and limited by that decision. That the recital in the preamble of the act was inaccurate and misleading—corresponding in that respect with the report—makes no difference. Congress was misinformed and mistaken as to the action which had been taken by the President in this case, but Congress did not intend that that action, whatever in very deed it was, should be examined and overruled by the courts. On the contrary, the reference in the preamble of the act to the report of the Secretary of State in this case, and to what, in his opinion, "the honor of the United States" required, was intended to incorporate into the act, and, as matter of law, did incorporate into the act the conclusion of the Secretary and the decision of the President—

> "*That the proper limits of the further consideration which* THE HONOR OF THE GOVERNMENT *should prompt it to give to this award should confine the investigation to the question of a fraudulent exaggeration*

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[1] This perversion of the Umpire's utterance was made by Mexico's counsel in a memorandum which was transmitted by Mr. Romero to Mr. Frelinghuysen, December 5, 1883, *while the convention for a rehearing was pending in the Senate.* (Ex. Doc. No. 103, H. R., 48th Cong., 1st sess., 681.)

It was repeated in Report No. 1316, Senate, 49th Cong., 1st sess., and this report was reprinted in Report No. 15, Senate, 51st Cong., 1st sess., on p. 30 of which this mysterious perversion appears.

Although the earlier report (No. 1316) was upon the *Weil* case, it nevertheless made this false application of the Umpire's words to La Abra.

of the claim by the parties before the Commission to which, under the provision of the convention, it was presented by this Government."

"And here it should be noted," says Mr. Chief Justice Nott, in his dissenting opinion, "that the jurisdictional "statute followed the decision of the Secretary of State, "and was in furtherance of his views, as may be seen in the "preamble. The action of the President and the act of "Congress must be construed with reference to each "other, and the later especially with reference to the "earlier."[1]

After quoting this Executive decision, which, he said, was rendered "unequivocable and unquestionable by the "fact that the President, upon the recommendation of the "Secretary, then proceeded to deal with the claim upon "the basis that the responsibility of Mexico for the acts "and inaction of its officers was a question finally settled," Mr. Chief Justice Nott says, on the point we have been making:

> "The case therefore comes into this court with the international question determined by the Umpire, and *the responsibility of the Mexican government reasserted by the constitutional and proper diplomatic authority of the United States.*"[2]

This was assumed at the time by Mexico's counsel, Messrs. Creswell and Lines, for in the motion which they filed in the Department of State on the 9th of September, 1879, for a reconsideration of Mr. Evarts' decision, they argued that the fifth section of the act of June, 1878, provided for "a judicial hearing," and that such hearing would undoubtedly be confined within the limits

[1] Record, 845. [2] Record, 843.

determined by the President unless his decision were reversed or modified. On this point they said:

> "According to the several decisions of the Secretary, the proofs are to 'be laid before Congress for the exercise of their plenary authority in the matter,' and to be accompanied by a recommendation (*to which Congress will doubtless seek to give effect*) that their investigation be *confined* '*to the question of fraudulent exaggeration of the claim.*'" [1]

It may as well be noted here as elsewhere that Mr. Evarts, in his report of August 8th, advised the President to transmit "the proofs" and his "conclusions" thereon to Congress only in case his decision should be "adverse to the immediate payment on these awards of the installments received from Mexico." Payment, as we have seen, was promptly made to La Abra Company, and no report was made to Congress until April 15th of the following year, and then only in response to a resolution of inquiry adopted by the Senate on the 27th of February, 1880.

In regard to the consequences of a final judicial condemnation of the President's action in this case, and a reversal of his decision, whether in express terms or by necessary implication, we beg to invite the careful consideration of the court to the observations of Mr. Chief Justice Nott in his dissenting opinion on pages 845 and 846 of the record. For convenience we quote what follows:

> "For the President to believe that the Mexican government might be wholly exonerated, and the award be wholly and absolutely invalidated for fraud, and the claimants ultimately be held to be entitled to nothing, and the Mexican government be adjudged entitled to have the whole of the award

[1] Ex. Doc. No. 103, H. R., 48th Congress, 1st Session, 584.

returned to it, and then for the President, so believing, immediately to pay away one-third of it to these same claimants, would be foolishness. Such inconsistency cannot be attributed either to the President or to the Secretary of State.

"Neither can it be supposed that in a transaction international in its character Congress intended that the judiciary should review the decision and action of the diplomatic branch of the Government, and undo what it had done, and subject the President and Secretary of State in their dealings with a foreign power to the implied censure of American courts.

"Nor can it be supposed that Congress intended to create by implication a possible equitable liability on the part of the United States to Mexico.

"For if the judiciary should decide that the Mexican authorities were not guilty of the acts complained of, and that the Company did not abandon the property because of those acts, and should declare the award to be void, wholly and absolutely, then it must follow that when the President and Secretary of State, with the same evidence of fraud before them, paid away $240,683 to the claimants, it was a wrong done to Mexico, and the United States will then be in the dilemma of either leaving this wrong to Mexico unredressed or of making good the loss from their own treasury. The statute does not provide for such a liability, nor contemplate it, and nations in international controversies do not submit their own diplomatic acts to such censure."[1]

And now we come to the question—

II.

On what evidence was the Umpire's decision founded, and what material part of it, if any, has been surcharged and falsifisd by the new evidence?

As we understand the jurisdictional act, the fraud which

[1] Record, 845.

will vitiate the award must be fraud by which the award was actually "*obtained*" as to the whole sum included therein, or as to any part thereof—"fraud *effectuated* by means of false swearing or other false and fraudulent practices." It was not the intention of the act to set aside the award in whole or in part on account of any allegations of fact or of opinion in the memorial of the Company (such as the prospective income or estimated value of the mines) or on account of any testimony of the Company's witnesses, no matter how false such allegations or testimony might be, unless the Umpire believed them, and, actuated by that belief, made the decision he did. The award, like any other judgment of a court of competent jurisdiction, imports verity; and the burden of proof is on the Government, under the act, to show that in making his award, the Umpire accepted as true testimony submitted by the Company which was, in fact, false and fraudulent, and but for which he would not have made the award. It is not enough to prove that certain witnesses swore falsely; it must be shown conclusively, or at least beyond reasonable doubt, that such false testimony was submitted by the Company, knowing it to false, and that the Umpire relied upon it in making his award; or, in other words, if the evidence that induced the Umpire to make the award remains unimpeached, the award must stand. Much more than this could be claimed under the decision of the court that this is a suit in equity, a strictly judicial proceeding brought to determine whether the judgment of an international court of final and exclusive jurisdiction was obtained by fraud, and that such suit must be governed by established legal principles; but for our present purpose we do not need to claim that the fraud must be extrinsic, or that it must not be such fraud as was tried or triable before the Commission. It will be enough for the

present if it be granted that the award is not to be set aside for any false swearing that was not actually efficient or operative in obtaining the award. And we assume that if the facts which in the Umpire's judgment made Mexico responsible actually existed, the award must stand, even if this court would not give those facts that effect in a case originally before it.

For example: If the Umpire believed that the local magistrate, Soto, issued the orders which he testified he issued, and that he afterwards illegally seized part of the Company's property and put up reducing works on it, and that he was not dismissed or otherwise punished when the higher court at Durango condemned his action as illegal, and that he continued in possession of the seized property under a lease that was given to placate him, and that he moved into the Company's principal hacienda and remained in it, working the Company's mines, for more than two years after the abandonment; and if the Umpire believed that Exall had been illegally imprisoned by the other local magistrate, Perez, and was denied protection or redress on appeal to the higher authorities, and that after he was released from prison he was threatened by the Prefect at San Dimas as well as by the magistrates at Tayoltita, and that he finally left in fear of his life, or because it was impossible for him to conduct the Company's business under such conditions; and if these facts were true, the award must stand even if this court as matter of law would not consider these facts sufficient to fasten the responsibility for the abandonment on Mexico. And this because the United States and Mexico committed that very question of liability to be determined by the Umpire, and solemnly covenanted to accept his decision as final, and "to give full effect to it without any objection, evasion or delay whatsoever." A decision cannot be said to have been ob-

tained by fraud because it is based upon a principle or an application of the law on the part of the Umpire that would not have been so applied by the court.

The court says that in view of the exceptional character of the case, and that there may be no ground to misapprehend the basis upon which the decree will rest, it is deemed appropriate to set forth in the opinion the principal facts bearing upon the issue of fraud.[1] The court then states the substance of the Company's memorial, and says that it contains no hint or intimation that the abandonment by the Company of mining operations in Mexico was due in any degree to its inability or failure to supply the money necessary for the development of its property and to meet the expenses of mining operations. That is true, and the reason that the memorial contained no such hint or intimation may have been that the Company could have had all the money that would have been required for the development of its property if it had received the protection that was necessary for the conduct of its work. Besides, the poorer it was the more it needed the protection to which it was entitled by law, and the less likely it would have been to abandon its new and costly machinery and buildings, which, with the mines, could have been retained under the Mexican laws at a comparatively trifling expense until some rational disposition was made of them. For it seems irrational to suppose that such expensive improvements as the Company's would have been left derelict, when parts of the machinery were of such value that the superintendent of the Durango mines, on the other side of the mountain, went to the expense of transporting them to his establishment under a stipulation filed in the local court to make payment when required.

[1] Opinion, 23.

The court then states the issue as follows:

> "That the La Abra Company ceased to work its mines in Mexico, and practically abandoned them, is undoubtedly true. But is it true that they did so in consequence of violence and outrages committed against it by the public authorities of the Republic of Mexico?" [1]

What follows is from the opinion of the Umpire on that question:

> "The local authorities at Tayoltita and San Dimas, far from affording to the claimants that protection and assistance which had been promised them by the Mexican Government, and to which they were entitled by treaty, not only showed themselves a spirit of bitter hostility to the Company, but encouraged their countrymen who were employed by the claimants in similar behavior, and even frightened them into refusing to work for their American employers. The conduct of these authorities was such, and the incessant annoyance of and interference with the claimants was so vexatious and unjustifiable, that the Umpire is not surprised that they considered it useless to attempt to carry on their operations, and that for this reason, as well as from the well-grounded fear that their lives were in danger, they resolved to abandon the enterprise." [2]

Now it is to be observed—and the court will see the force of this observation more clearly on a careful reading of the whole of the Umpire's opinion—that it was not the seizure of the Company's supply trains, or the murder of Grove, or the robbery of "Scotty," or the requisition of Valdespino, or any of the things that occurred in the early history of the Company, that impressed the mind of the Umpire in making his award—it was *the conduct of "the local authorities at Tayoltita and*

[1] Opinion, 25. [2] Record, 8.

San Dimas." But the court scarcely alludes to this material part of the case, although it dwells at great length upon things that happened in 1865 and 1866, two years before the abandonment. In the Company's notice of March 17, 1870, to the Department of State, the claim was based upon violence and outrages "*committed in 1867 and 1868.*"[1] Besides, it stands to reason that as the abandonment occurred at the close of Exall's superintendency, which had lasted about a year, we must look for the efficient causes of that abandonment in his time.

The court says that "the principal witnesses before the Commission were Bartholow and Exall;"[2] and again, "that there was before the Commission some evidence which, uncontradicted or unexplained, tended to support the allegations of outrage, violence and neglect of duty on the part of the Mexican authorities may be admitted. That evidence came largely from Bartholow and Exall."[3] But it will be shown further on that there were other witnesses more important than either of these, and that there was also documentary evidence of a material character. The court also says:

> "But it is manifest that the Umpire could not possibly have reached the conclusion that he did in respect to the La Abra claim if the letter book giving detailed accounts from time to time of all that occurred at the mines while in charge of Bartholow, DeLagnel, and Exall had been in evidence when he rendered his decision. * * * Let us see [says the court] how far this general statement is justified by the evidence adduced in the present case, when examined in connection with the testimony brought before the Commission."[4]

The court then takes up the murder of Grove, and compares what Bartholow said about it in his letter of March 7, 1866, to Garth, with his deposition, taken eight years

[1] *Ibid.*, 4. [2] Opinion, 26. [3] Opinion, 27. [4] *Ibid.*

later and filed with the Commission. There is doubtless a discrepancy, but it is not suprising when one remembers that General Bartholow was a man of many affairs, that the letter book which would have refreshed his recollection had been left at the mines; that two of his train captains had been murdered, and that the train in charge of the one whose body was not recovered had been seized by the military. General Bartholow might readily, after such a lapse of time, testifying as he did from recollection, connect some of the incidents of the one case with the other. But his testimony on this subject was not the only testimony before the Umpire. Loaiza, a Mexican of some standing and education, testified to the killing of two of the Company's trainmasters, and when he was re-examined by the Mexican Government, after the rendition of the award, he was not questioned on that point. The fact of the double murder, and of the seizure of the train in one of the cases, was substantiated by several other witnesses. Grove, according to Bartholow's letter, was murdered near Candelero Creek. The other trainmaster, according to the hearsay testimony of Alfred A. Green (one of General Slaughter's sub-agents)—

> "Was killed by some Mexican soldiers near El Toro, State of Sinaloa, while on his way from the Company's mines to Mazatlan with a mule train of supplies for the Company, and the mules and supplies were taken by the soldiers."[1]

Avalos, who is vouched for by witnesses on both sides, testified that he had heard of the murder and loss of *two* captains of the Company's mule trains,[2] and Loaiza, another Mexican witness (already mentioned), testified that Grove was murdered "*by the people of the country* * * * at a place called El Arroyo del Candelero"

[1] Record, 35. [2] *Ibid*, 52.

(agreeing, it will be observed, with Bartholow's *letter*), while the other muleteer was killed—at all events he disappeared—and his train was captured by the republican army.[1] This happened "*at the end of 1865* or the beginning of 1866"—prior to Grove's murder, and *also prior to the commencement of the letter book, which does not cover the first six months of General Bartholow's superintendency.* The Umpire had also before him Clark's evidence, which showed that Grove "*was travelling alone and not in charge of his train of mules*" when he was murdered.[2] It is thus clear that the Umpire had before him evidence in regard to Grove's murder, of precisely the same kind as is now brought forward in Bartholow's letter. The Umpire makes no reference whatever to the occurrence which, as already stated, happened two years before the abandonment.

General Bartholow was at the head of a banking house in St. Louis, and had been colonel of a Missouri regiment in the civil war before he was brevetted brigadier. Mr. Enos Clarke, United States Commissioner, who took Bartholow's deposition, certified that he was well known to him as a prominent banker and citizen of St. Louis, a man of responsibility and of excellent character for truth and veracity, and the Honorable Samuel Treat, judge of the United States District Court for the Eastern District of Missouri, certified that in his opinion Thomas J. Bartholow, who was personally known to him, was "a prominent banker in the city of St. Louis and a gentleman of unquestioned veracity and integrity, whose statements are entitled to the fullest confidence."[3] General Bartholow seems to have been known—by reputation at least—to members of the House Committee on Foreign Affairs, for they said of him, of their own motion, in the last report that was made on the bill

[1] Record, 72. [2] *Ibid*, 63. [3] Record, 173, 174.

(now the jurisdictional act) that it was "fair to assume that he believed that the mines were valuable, and when he left them had high hopes as to their future."[1] It seems hard, when so many misstatements of readily ascertainable facts have been made in this case by the representatives of Mexico and the United States, that one of our citizens who deserved so well of his country, and was so highly respected where he had lived such a long and useful life, should be denounced as a perjurer when he is dead. There is scarcely a man who has undertaken to state an occurrence from memory, after the lapse of many years, who has not been surprised on comparing his recollection with the details as recorded at the time.

The court next takes up the robbery of "Scotty" and describes it as "another of the outrages alleged to have been committed by the Mexican authorities and to have resulted in driving the La Abra Company from its property.[2] But this also happened two years before the abandonment, and is not alluded to by the Umpire. It is, however, to be observed that the amount taken from "Scotty," $1,178, *is charged, as Bartholow testified in his deposition, to "robbery account" in the books of the Company.* Bartholow's letters to the tax collector and General Corona show that "Scotty" was intrusted with a large sum of money to be used in making a compromise settlement of an illegal charge or tax of $3,000 to $4,000, which had been levied on goods belonging to the Company, and that he had besides a check for $1,000, the proceeds of which he was to bring up from Mazatlan for use at the mines. He settled the taxes for a nominal sum, and had, on his return from Mazatlan, about $3,000 in coin on his person. Of this, according to Clark, the

[1] Report No. 1143, H. R., 52d Cong., 1st Sess., 8.

[2] Opinion, 29.

soldiery took $1,178, perhaps, as the Mexican Commissioner afterwards suggested, by way of "duty on circulation."[1] Even private soldiers levied such taxes in those times and places.[2] Clark testified in 1870, that he visited General Guerra's headquarters with "Scotty" for the purpose of obtaining the return of the money, and General Guerra, for aught that appears, might have been examined by Mexico. Avalos testified that when Scotty got back to Tayoltita he told him that he had been robbed by the military.[3] The ground for the attempt to recover the money from General Guerra was the military character of the persons who had taken it. But, curiously enough, the correspondence which General Bartholow says he opened through Colonel Vega with General Corona[4] on the subject, has disappeared from the letter book, if it ever was copied into it.

Touching the Valdespino affair, to which so much space is devoted in the opinion,[5] the court seems to have overlooked the greater part of the evidence which was before the Umpire. That evidence showed that the affair had happened *before either Exall or Granger reached the Company's mines;* and — what was of more importance—the Umpire had before him the original requisition,[6] which showed on its face that it was to be levied not alone or chiefly upon the Company, but "*upon those persons in best circumstances of this district and of the villages and estates appertaining to the same.*" It is true that Granger said in his deposition for the Company, "this letter demands $1,200 from said Company, and it is needless to say the demand was complied with." But this letter of Valdespino to DeLagnel (like the requisition on the prefect, *both of which were before the Umpire*), showed on its face that the levy was general, and *that Colonel*

[1] Record, 396. [2] *Ibid.*, 191, answer to question 16. [3] *Ibid.*, 52.
[4] Record 220. [5] Opinion, 31, 32, 33. [6] Record, 127.

DeLagnel was required to contribute his share "toward completing the contribution levied by the gefetura."[1] The Umpire had also before him Granger's deposition of August 23, 1871, given on behalf of the Mexican government, in which he showed his ignorance of the affair by stating that Valdespino "asked $1,200 from the La Abra Company, but that *he did not know whether the Company paid it or not.*" It is respectfully submitted that, in the face of this record, it cannot be justly said—"here we have a distinct assertion by the Company, through its witnesses, that this demand to pay $1,200 was met by the Company." It is clear that the Umpire was not deceived, and, as already stated, his award does not show that he attached any weight to the earlier difficulties which the Company had with the authorities. It may as well be added here that on this affair, as well as on all the others, the Umpire had before him the testimony of Mexico's witnesses, and (as Mr. Evarts observed) the text of his award shows that he gave the evidence on both sides the most careful consideration. For example: In this Valdespino affair the Umpire had not only the original documents, which spoke for themselves, and Granger's subsequent denial of any knowledge on the subject, but he had also the testimony of various Mexican witnesses, among them Delgado, to the effect that "a military commander, Jesus Valdespino, had solicited from the inhabitants of this place some assistance for his troops, and that it was willingly given to him by every resident of means, as in the case of deponent, who contributed a small portion."[2] And the Umpire had also before him the argument of the Mexican agent Avila, and the opinion of Mr. Zamacona, in which they discussed the affair.[3] DeLagnel testifies that he was advised to make the contribution which he did make for

[1] Record, 54, 55. [2] Record, 135. [3] *Ibid.*, 394, 422.

the reason that, if he refused, the Company's hacienda would be sacked; and that, as it was, the Company's Mexican employees deserted the works because they were afraid of their own soldiers.

Here the court leaves the alleged wrongs of the Company—back in 1866—remarking that there were undoubtedly some unpleasant occurrences, such as the affair between Exall and Perez,[1] and takes up the question, "What does the letter-impression book disclose as to the real cause of the Company's abandonment of its mines"?

The court remarks that in Bartholow's reports, as found in the letter book, no statement is made showing that any difficulty was in his way that had its origin in the acts or conduct of the public civil or military authorities of Mexico. But, as the court observes, his first letter to Garth copied in the letter book is dated February 6, 1866, and that was more than six months after his superintendency and active operations at Tayoltita had begun; and, as already stated, the evidence shows that a train of supplies had been captured and the head muleteer, a Mexican, murdered late in 1865, or early in 1866. The refusal of the court to regard the letter-book as incomplete, defective, and misleading is a source of serious injustice, after such a lapse of time, to the parties concerned. Bartholow says in his letter of February 6, 1866, referring to the fact that Grove and Hardy had each been put in charge of a train:

> "This is necessary, for the reason that if some *American* in the employ of the Company is not constantly with the trains, there is great danger (if not a certainty) that the animals would be taken by the military authorities."[2]

In that same letter he refers to an earlier report made by him to Garth, which, of course, is not in the letter

[1] Opinion, 33. [2] Record, 203.

book. We have already seen that the man who was suspected by Bartholow of having planned the murder of Grove was himself a convicted murderer, who had secured leave to continue in the business by bribing the officers of the law. One of the leading merchants of Mazatlan, Mr. Echeguren, whose credibility is unimpeached, testified that he recollected—

> "To have heard from the first superintendent, General Thomas J. Bartholow, of the troubles and difficulties he encountered, soon after they occurred, on the road from this place to Tayoltita in *1865* and 1866, when attending to the transportation of the Company's machinery and supplies, *being constantly detained on the road by the said military people, and that he had to contend with them and to pay them large amounts of money, 'prestamos,' in order to be allowed to go on.*"[1]

If we had copies of Bartholow's earlier letters (that is, a complete instead of a defective and misleading press-copy book), we might be better informed as to these difficulties which he says in his letter of February 7th were so great that, if he had anticipated them, he would never have undertaken the task. It has been insinuated on the other side that he incurred expenditures which he did not report to the Company, and it is a fact that when he returned he left an indebtedness of over $25,000, after having spent more than a hundred thousand dollars in the Company's service, representing nearly $200,000 in United States currency. He had induced his friends to invest, and he was determined to persevere; and it may be that he was not so frank in stating his injuries and losses as he might have been.

The court then takes up the letters of De Lagnel, for the purpose of showing the real cause of the Company's

[1] Record, 104.

abandonment of the mines, and makes citations from one letter after another, including the statement in his letter of November 17, 1866, that "at present the mine is, I may say, *bare of metal*."[1]

But this was not one of La Abra Company's mines. The portion of the letter omitted from the opinion, and indicated by points, shows that De Lagnel had changed the subject and was speaking of a mine belonging to the Nuestra Señora Guadalupe Company, in which La Abra Company was a stockholder, and in regard to which Mr. Garth had written to him for information.[2] There are other references in De Lagnel's letters to this Guadalupe Company, its mine and its stock.[3] This inadvertence is important as showing how easy it is in dealing with such a mass of complicated details, a generation after the events, to make an inference unintentionally to the discredit of an international award which should at least have the benefit of all the presumptions attaching to a domestic judgment.

In its excerpts from De Lagnel's letter of January 5, 1867, referring to his previous draft for $7,000 (which, by the way was paid), the court stops at the following sentence:

> "The prospect at present is most favorable; the mill is in working order, the retort and furnaces ready for the separation and preparation of the silver for market, and the ditch so far advanced when I left that I expect to find it completed on my return. The stock of ore is large and I believe good, though that remains to be seen. Of the success I have strong hopes."[4]

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[1] Opinion, 34. [2] Record, 288.

[3] *Ibid.*, 241, in letter to "Dear Taylor"; 257, near bottom of the page.

[4] *Ibid*, 257.

The danger of doing injustice in such a belated review is again illustrated by the reference which the court makes to De Lagnel's letter of February 5, 1867, the last one (so far as the letter book shows) which he wrote to Garth before returning to New York. The court quotes from this letter what De Lagnel says about the delay in the completion of the mill and the need of drawing on the home office for $7,500 more, but overlooks the following remarkable statement which De Lagnel made in that same letter touching the outlook for the Company's enterprise:

> "*The mines are looking better, yielding more, and, I believe, richer metal.*" [1]

These were his last words from Tayoltita to the home office in regard to the condition and prospects of the Company's mines, as shown by the letter-press copy-book. The court does not notice the surprise that De Lagnel expressed in his testimony in this suit at the absence of several important letters of his, which he was sure he had written and copied into the letter book, such as those letters of May and June, each notifying Garth of a draft of $15,000 gold to pay off Bartholow's indebtedness; his letter giving an account of the assay of the Company's ores which he had made in conjunction with Mr. Elder at La Puerta, with results by which he was

[1] Record, 262.

Mexico's distinguished counsel, setting out in his argument to show how De Lagnel's letters gave a constantly darkening account of the mines to the Company in New York, inadvertently made the same omissions. After assuring the court that he has "examined De Lagnel's letters to Garth with some care," and that he had extracted all references which throw any direct light upon the value of the ores, he stops short with the following sentence from De Lagnel's letter of December 21, 1866: "The stock of ore is large, and, I believe, good, though that remains to be seen. * * * The prospect from the mines is not as good as formerly, though they vary so constantly that I have ceased to permit myself to be readily elated or depressed by their condition."

so greatly "elated;" and his letter in the fall of 1866, which he took it for granted he had copied into the letter book, giving an account of the "armed demonstration" which was organized in the wine shop of the local magistrate (Soto), opposite the Company's hacienda, and came so near re-enacting the Carmen and Rosario tragedy.

We come now to the evidence, as we understand the case, on which the Umpire rendered his award; and we propose to indicate, what we believe we can demonstrate on a rehearing to the satisfaction of the court, that that evidence, which was the ground work of the Umpire's award, still stands intact.

We have already made a citation from the award (*supra*) showing how the Umpire's mind was impressed by the misconduct of the prefect at San Dimas and the local magistrates at Tayoltita. His reference to the steps that were taken by the superintendent to obtain protection from the local authorities and (failing these) to his appeal, "through a lawyer of high character to the highest authorities in the State"[1] enables us to fix the time and the events which the Umpire had in mind. The superintendent was Exall, the lawyer of high character was Chavarria, and the official misconduct doubtless included the series of magisterial orders around which the controversy has waged in this case from the outset until it came into this court. The Court of Claims found that these orders were illegal and in violation of the Company's rights, and the learned Chief Justice was of opinion that the United States must fail in this suit unless these orders were proved to be forgeries. The authenticity of these orders is admitted, but there is a dispute as to the dates of the second and third. A copy

[1]Record, 8.

[2]Record, 493-497; 513, 516.

of the first—that of the prefect Mora—was introduced in Granger's testimony for the Company,[1] and another copy was introduced by the Mexican government,[2] and both of these copies gave the date of June 3, 1867. The Mexican government had access to the original, which was issued by Mora to Soto, and of which there was doubtless a record in the prefecture at San Dimas. The Mexican Commissioner insisted that the copies were correct as to the date, June 3, 1867.

But Soto's orders, the originals of which are on file in the Department of State, are somewhat obscure so far as the dates are concerned. The month "Julio" might be "Junio," but in both cases it looks more like "Julio." But there is no question that Soto's orders were issued either in June or July, 1867. They are described in question nine of Granger's deposition as "dated respectively 4th and 24th of July, 1867."[3] But the dates in the printed copies of the exhibit are July 4th and 5th.[4] The Mexican Commissioner insisted that the date of Mora's order, June 3, fixed the date of Soto's first order as June 4, because the latter refers to "the communication of *yesterday*, dated the 3d, received from the gefe politico of San Dimas." The originals of Soto's orders were before the Commission. Soto's second order refers to the first order (or some other) made twenty-four hours earlier. The United States, through Mr. Lines, agreed with the respondents in the Court of Claims that the true dates were June 3, 4, and 5, 1867, respectively. But after Mr. Maury came into the case he insisted (and Mr. Foster agreed with him) that the true dates were July 3, 4, and 5, 1867, respectively. The character and effect of the orders are the same whether they were issued in June or July. But if they were issued in June, they, or the official interferences of which they were the

[1] Record, 49. [2] *Ibid*, 124, 125. [3] Record, 49. [4] *Ibid*, 54.

1. Record, 400, 401.

culmination, might have been alluded to in Exall's letter of June 11, 1867, which does not appear in the copy book, although the copy book shows that it was written, and Garth's original letter of August 10, 1867, shows that he received it.

We come now to what we regard as the material evidence before the Umpire, which we will summarize here, going more into detail if a rehearing is granted.

There was no controversy as to the title of the Company to its mines or as to their purchase price or the expenditures for improvements. The Umpire accepted Mr. Collins' statement of the amount received and expended by the Company. Mr. Collins could have been examined, and compelled to produce the Company's records that were kept in New York,[1] but the Mexican agent (Mr. Caleb Cushing) decided not to call him. The Company's counsel, Messrs. Britton & Ely, had previously offered their witnesses to Mr. Cushing for cross-examination,[2] and the Mexican government subsequently re-examined three of them—Granger, Del Valle, and Avalos—the first-named four separate times, and filed their re-examinations with the Commission. The Umpire knew that there was no bar to such re-examinations on either side, and that they had in fact been made in the instances given. He was also aware that the claim had been pending before the Commission for five years, when it came to him on the disagreement of the Commissioners, whose opinions, with the briefs of counsel and the testimony on both sides in print, were before him. He was an accomplished Spanish scholar and had been in the diplomatic service of Great Britain in Mexico. Among the documentary evidence submitted to him there were four documents dated, as already stated, in June or July, 1867. These documents—their nature,

[1] 16 Stats., 7, [2] Record, 653, 667, 668.

purpose and effect—were discussed on pages 283–300 of the Appellant's Brief, in dealing with the 8th specification of the bill of complaint; Mr. Maury discusses them on pages 177–189 of his brief, and Mr. Foster on pages 73–80 of his. Mr. Zamacona discussed them in his opinion, pages 17–22.[1] But the court, as already observed, does not allude to them in terms, although they may be included in the general reference to "unpleasant occurrences such as the affair between Exall and Perez."[2]

It is important here to observe that the Umpire had before him the admission of the Mexican Commissioner that Mora's order, as translated into English, had assumed "the aspect of an act of despotism or a threat against property."[3] Here is the order as given in the record:

"GEFETURA POLITICO OF THE
PARTIDO OF SAN DIMAS.

"To Judge Gaudalupe Soto,
Sole Conciliador at Tayoltita:

From your communication this Gefetura has learned, with great displeasure, the abuses committed by these Americans, who at first agreed to pay their operatives in money, then to pay them half and half, and thirdly to pay them one third. Notify them through your court, and by my order, to at

[1] Record, 398–403.

[2] Referring to these orders, the Court of Claims said: "In the troubles incident to the disagreement, *the Mexican authorities failed to protect the officers and the rights of the Company to the extent they were entitled to;* but that such failure was for the purpose of driving the Company away and getting possession of the mines does not appear as alleged by the respondent." (Record, 831.)

And Mr. Chief Justice Nott, in his dissenting opinion: "There is but one way by which they (the United States) can have the international question re-examined, and that way is by alleging and proving that *the orders and letters of the Mexican officials, upon which the Umpire relied, and which made the international case presented to him, never existed,* and that the award was obtained by fraud effectuated not by perjury, but by *forgery.*" (Record, 850.)

[3] Record, 399.

least comply with the last contract, that is, to pay them one third in money, otherwise that they vacate the mines and allow the operatives to work them as they can, since neither the mining ordinances permit them to pay in goods only, nor will the government consent to such abuses, and it is already tired out with the thousand complaints upon this subject.

You will show this communication to the American in charge of that mineral.

Independence and Reform.

SAN DIMAS, *June* 3d, 1867."

Mr. Zamacona claimed that the words "otherwise that they vacate the mines and allow the operatives to work them as they can" should have been translated "otherwise let the operatives work the mines as they can," a distinction, as Judge Black remarked, without a difference, for "it would be difficult to understand," he said, in his argument before the Umpire, "how the Company could obey this order without vacating the mines."

"But (he continued) whether the translator misinterpreted the document or not, it is certain that the judge to whom it was addressed, understood it as we do, and immediately acted on it according to that understanding. In his communication to the Company next day, July 4, 1867, the judge, by order of the gefe, says imperatively, 'desde luego *desocupar las minas*—You will immediately vacate the mines'; and not having received an answer to this mandate within twenty-four hours, the judge repeats the order, and requires an arrangement to be made within two hours, and he concludes, 'if you come to no arrangement, you will vacate the mines, so that they [the Mexican miners] may lose no more time.'"

Further extracts from this argument before the Umpire are printed in the Record, 746–748.

The Umpire saw that as the Prefect's order was understood and applied by the local magistrate (Soto), it was—

as admitted by Mr. Zamacona—" an act of despotism or a threat against property." The Umpire was also informed that under Mexican law the Company had the right to suspend work altogether on any of its mines for four months in the year;[1] and, besides, that it was not the prefect and justice of the peace that had jurisdiction of such matters, but the " deputacion de mineria," as Judge Black observed, " established by law in every mining district."[2]

It must have been as plain to the Umpire as it would be to every unprejudiced person that no extensive operations could be conducted and no investment of capital made with any safety where, in flagrant violation of their legal rights, the mine owners could be ordered to make arrangements with their laborers within two hours or to vacate their mines. The Umpire saw that this was no exaggeration or misrepresentation by the Company. The extreme alternative is expressed in both of Soto's orders. In the first order it is, " that you immediately vacate the mines;" in the second order, you will vacate the mines " *within two hours.*"

Soto's orders were followed by a letter from the prefect, dated July 10, 1867 (as to the date of which there is no dispute), which, referring to a brief stoppage of work at the mines, closes as follows:

> " Nevertheless, if you don't choose to continue your work, give the *people* permission to collect ores in the mines, as *I will not hold myself responsible for*

[1] Record, 271: Exall was aware of the Company's rights, for he said in his letter of July 13th, 1867, to Garth: " If I am not able to get men in the other mines, I am privileged by the mining laws of the country to stop working in mines four months in the twelve." In his letter of Aug. 16, 1866, to Garth, De Lagnel refers to "Rockwell's translation of the mining laws of this country" [Mexico], of which he seemed to have a copy at the hacienda. (Record, 239.)

[2] Record, 746.

the consequences in a town where the people are without work."

At that time Mexico was in a fury against foreigners, including Americans. The Imperialists had been routed and Maximilian had been shot. "Mexico for Mexicans" and "*Mexican Mines for Mexicans*" were watchwords. The furore was notorious. Our newspapers were full of accounts of it, and the mass of testimony before the Umpire as to the hostility and threats of the people and officials against La Abra Company was not, as counsel on the other side have suggested, intrinsically improbable, but merely local symptoms of a prevailing condition.[1]

Del Valle, a Spanish merchant of high character, from whom the Company bought most of its mines, and for whose credibility both Mr. Zamacona and Mr. Maury have vouched, testified that Mora, the same prefect who issued the order of June 3d—

> "Was very badly disposed towards the Company, and that he even went so far as to say to the deponent that it was *necessary to break these Companies up and drive them away from there.*"[2]

The Umpire had also before him Mora's own testimony on this point. General Zarate, the Governor of Durango, had sent for Mora, evidently after Chavarria's appeal to him for protection on behalf of the Company, and Mora says, referring to that interview, that he told the Governor

[1] It appears in Foreign Relations, 1867, page 409, that Mr. Otterbourg informed Mr. F. W. Seward, May 25, 1867, that "an article in *La Union* of the 10th of May so completely exposes the passions sought to be aroused against the United States as to claim the attention of the Department,"

In the same volume, page 366, there is an extract from the *New Orleans Crescent* of March 7, 1867, in which it is stated that "the great idea in the Mexican mind is to get rid of foreigners *nolens volens;* and whether it is the French this year, or the people of the United States next, it makes but little difference,"

[2] Record, 78.

that the Company "consisted of Americans, and, like all other foreigners, was working for the ruin of Mexico."[1] He also adds that the Governor "refused it the protection that it prayed for."

Take Chavarria's testimony in the same connection, relating, as it does, to the situation at the mines in July or August, 1867. The Umpire's award, as already stated, shows on its face that he was impressed with the deposition of this witness, taken, as it was, in open court at Durango, the capital city of the State in which the mines were situated, and the residence of Mr. José M. Hernandez, the Mexican district attorney, who had charge of the defense against La Abra Company's claim.[2] The Umpire had before him the certificates of the eminent judge (Barraza), before whom Chavarria was examined, as to his high character, and as to some of the circumstances under which he was employed by Mr. Joseph G. Rice to appeal to the Governor of Durango on behalf of the Company.

Chavarria's testimony (to which the Umpire's attention was particularly invited by Judge Black in his argument for the Company[3]) showed, in brief—

> That in July or August, 1867, he had private business at San Dimas, and being personally acquainted with Marcus Mora, the prefect, they went together to see the Company's mines and works at Tayoltita, and conversed upon their condition; that

[1] Record, 89. [2] *Ibid.*, 122, 124.

[3] Mr. Maury says on p. 105 of his brief: "In his argument before the Commission Judge Black evidently treated the testimony of Exall and Mora as unworthy of consideration, for he said: 'This case cannot be decided against the claimant without pronouncing *Chavarria* a perjured man.'" But this is clearly a *non sequitur*. Mora's testimony is certainly remarkable, but not more so than his order of June 3 or his letter of July 10, which need no corroboration, for they are admitted to be, with Soto's orders, authentic documents in the case.

Mora confided to him his plan of driving the company out and obtaining possession of its mines, and offered him a share, which he refused; that from this conversation with Mora and what he witnessed on the second day of his visit he became satisfied that the prefect and the mining people were strongly bent on annoying the Company and driving it away; that they were continually provoking quarrels with it; that the prefect and some of the workmen stated that they believed the Company to be annexationists; that it was therefore hateful to Mexico, and that they thought best to drive it away anyhow; that for this purpose the authorities instigated the laboring people, on the pretext of their wants, not to work for the Company; that the Company's ores were frequently stolen, and that it was not legally protected by the Gefetura, where the superintendent usually made fruitless complaints of the thefts.

That on his return to Durango he met Macario Olvera on the road [*Soto's son-in-law, who succeeded Mora as prefect*], and that they conversed together in regard to the expulsion of La Abra Company, and Olvera acknowledged to him the plans and intentions existing at Tayoltita on the part of the authorities and operatives, and that he was interested in that hostility in combination with the prefect, whom he was going to replace.

That on the second night of his visit to Tayoltita there was a meeting of the Company's workmen, at which the greatest disorder prevailed, and that the head miners, by order of Mora, mutinied against the Company and refused to work any longer in the mines.

That subsequent to March, 1868, he conversed with Olvera in Durango, and also with Mora on his frequent visits to him when he was in prison, and was told that the Company had finally been compelled to abandon their mines at Tayoltita, owing to the concerted hostility against it, in March, 1868.

That he was employed by Mr. Rice, of California, as Exall's lawyer to solicit, and that he repeatedly solicited from the State government protection for

> the Abra Company to suppress the robberies and outrages which the Company were experiencing at Tayoltita, but all to no purpose, as after innumerable steps and measures the Executive of the State never even so much as requested the authorities at San Dimas to comply with their duties. The only answer given was that the government of the State, at whose head was Francisco Ortez de Zerate in 1867, would not meddle in private matters.

There is much more in this deposition, but the foregoing summary will show what the Umpire had before him from this source in regard to the character and purposes of Mora and Olvera, their conduct towards the Company, and its futile appeal to the higher authorities for protection and redress.[1]

Now, at this point the court will see what the Umpire meant when he said, in denying the Mexican agent's motion for a rehearing (which had been made on the ground that all the witnesses for the claimant were perjured)—

> "Unless there had been proof of perjury the Umpire would not have have been justified in refusing credence to the witness on the one side or the other, and could only weigh the evidence on each side and decide to the best of his judgment in whose favor it inclined.
>
> If perjury can still be proved by further evidence, the Umpire apprehends that *there are courts of justice in both countries by which perjurers can be tried and convicted, and he doubts whether the government of either would insist upon the payment of claims shown to be founded upon perjury.*[2]

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[1] Mora, it appears, was dismissed and imprisoned, but not for offenses against the Company, and Olvera was killed a year or two after the abandonment.

[2] Ex. Doc. No. 103, H. R. 48th Cong., 1st Sess., 127, 128. The context shows that the Umpire meant by "shown" *judically shown.* Gardiner was indicted, tried and convicted by the United States Government for palming off a fraudulent and fictitious claim upon the commission organized under the treaty of Guadalupe Hidalgo.

The Umpire knew that Chavarria could have been re-examined by the Mexican Government or prosecuted for perjury if it was really believed that he had perjured his soul and betrayed his country in an international arbitration. But see how his testimony was corroborated by another Mexican witness whose depositions were before the Umpire. Avalos, vouched for by Dahlgren and Martin, successive superintendents of the Durango Company at San Dimas,[1] in their testimony before the Umpire, testified that he was present at that identical meeting which Mora addressed. He said:

> "At another time, I think in the month of July, 1867, when I was engaged in bringing down to the mines the ores belonging to La Abra Company, I met all the Barrateros and men employed in and about the mines going down to the hacienda, and the Barrateros and all the other men stopped and talked with me, and they all said that *an order had been sent up to the mines by Marcos Mora, gefe-politico of that district, to stop work, and ordering them all to Tayoltita.*
>
> "When I came down to the town in the evening the gefe was at the house of Guadalupe Soto, and I heard the gefe (Marcos Mora) tell these men that the Company did not work as he (the gefe) wanted them to work, and *employ all the men who were out of work at Tayoltita,* and that *he would not let any of them work if they did not employ all of them;* and he said at the same time that *he was going to take the mines away from the Company and give them to all the people to work them as they pleased;* and that night I remember well I did not sleep at all, for the words used by the gefe-politico to the crowd of miners were well intended and had the effect to excite the Mexican miners and men out of employment to riot and perhaps to something much worse than that, and I expected serious trouble that night for the Company.[2]

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[1] And vouched for by Dahlgren in the Senate investigation.

[2] Record, 52.

The Umpire had also before him a deposition purporting to be a re-examination of Avalos by Judge Quiros on behalf of the Mexican government, *in which no question was put to him in regard to the conduct of the prefect*, and in which he asserted *that it was true that the people had prevented the Company from working.*[1]

There was, furthermore, a third deposition of Avalos before the Umpire, reasserting the truth of the original deposition in every particular, and making the following statement (as remarkable as that of Ex-Governor Galan's which was also before the Umpire[2]) in regard to the methods that Mexico employed to defeat the claim of the Company:

> "I never gave my testimony in this case at San Dimas, or at any other time or place, of my own free will and accord, except before Consul Sisson at this port [Mazatlan], in the month of May, 1870, in favor of the Abra Silver Mining Company as I have stated; nevertheless, it is true that Quiros, the judge at San Dimas, sent for me to give a deposition before him last summer, in connection with this case, and he sent me word that if I did not go to court, and *give evidence against the Abra Mining Company, he would fine me one hundred dollars and otherwise punish me.* I went to the court and there found a multitude of natives of the country armed, and some of them threatened me with violence *because the judge told them that I had given my deposition in favor of the Company and against Mexico.*
>
> "The judge wrote a deposition for me to sign, a part of which was not true, but I did not sign it because I could not write my name well enough to do so, otherwise I might perhaps have signed it or put my mark to it, or to anything else they might have written, as I would not have dared to resist under the circumstances, as the general feeling prevailing there was one of violence, and those present

[1] *Ibid.*, 131, 132. [2] *Ibid.*, 188.

were too numerous and incensed against me for having told the truth in favor of the Company two years before."

But the Umpire had also before him the testimony of Soto himself, given *on behalf of the Mexican government*, in regard to these orders and the circumstances under which they were issued:

"Question. When you were judge in Tayoltita, in 1867, did you direct and issue the communications dated respectively the 5th and 4th of July, copies of which have been shown you, and which appear on page 6 of these proceedings, he replied that *he is certain of having issued such communications to the administrator of the Abra establishment*, and that he did so because there had been *a rising of the people to compel him to* * * * ."

"On this deposition being read to him he added that the communications which he issued were in consequence of the fact that, besides the disturbance on the part of the people, *he had received orders* to that effect from the political chief, Marcos Mora; *all in consequence of the failure of the superintendent to contract with the operatives for working the mines.*"

There was other evidence before the Umpire, showing that this attempt by the local magistrates to dispossess the Company was not made because it failed to pay its workmen, as alleged falsely since the award was rendered, but because the Company did not employ all the unemployed laborers that had flocked to Tayoltita. Nor was the complaint that the Company paid largely in goods anything but a pretext, for that was a matter of contract, and, as already stated, the Company had a right, under the law, to stop work altogether in any of its mines four months in the year.

Now (following the evidence before the Umpire, in sequence of time), it was proved to him that this same

Soto, two or three months after these orders were issued (*and when his son-in-law, Olvera, had become prefect at San Dimas*), seized upon the Company's Guadalupe hacienda, a small piece of level ground convenient to the mines, and proceeded to erect upon it reducing works, to which the Mexican miners could bring the best of the Company's ores (which they were only too ready to steal) for reduction by him. This he did under cover of a false and fraudulent "denouncement" on the ground that the Company had abandoned the piece of ground in question. It was also before the Umpire that, instead of promptly deciding so plain a case, Olvera gained time for his father-in-law by forwarding the papers to the Superior Court at Durango, where the denouncement was finally declared illegal. This was judicial proof to the Umpire that the local magistrate, whose duty it was to administer the law, had violated it to the Company's peril for his own gain. It was also before the Umpire that the higher authorities, instead of dismissing Soto, or even reprimanding him for such malfeasance in office, kept him as magistrate at Tayoltita, and thus encouraged and aided him in his attempts to drive the Company out. "The higher courts," said the British consul at Mazatlan, in his note of June 10, 1876, to the President of the Rosario and Carmen Mining Company, "were unwilling to punish their judges, and thus they became petty dictators; foreigners had no redress, and if they complained were treated as aggressors, as in the case of your employees." (Report No. 700, H. R., 45th Cong., 2d Sess.)

There was also evidence before the Umpire conclusively proving that after Perez had kept Exall shut up some nights by himself in the pest house, he executed a lease of the Guadalupe hacienda to Soto "to conciliate him.[1]"

[1] Record; 52 foot of page.

Soto produced this lease in evidence, with its extension by Granger.[1] Then there was the testimony of various witnesses showing that after Exall had gone, Soto and Granger carried on the business at the old stand. Of course, Soto did this, so the Mexican witnesses said, and so said Soto, by *Granger's permission;* and some of these Mexican witnesses also said that the miners who took the ore from the Company's mines to Soto's reduction works did so with *Granger's permission.*[2] The meaning of all this was doubtless clear to the Umpire, for he knew from other evidence, such as that of Martin and Avalos, that Soto had moved with his family into the Company's establishment, and was still living there, in possession and at work, in 1870. The agent of the Company, General A. W. Adams, found this Mexican magistrate so in possession in May, 1870, when he visited Tayolita.[3]

But the Umpire had Granger's pretended extension of Soto's lease before him, and noticed that it was not executed by him as agent for the Company.

With these proofs before him—the orders of ejectment speaking for themselves—the Company's appeal for protection and its denial established, the illegal character of the seizure of the Guadalupe hacienda by Soto judicially proved, and its purpose so evidently incompatible with the successful conduct of the Company's operations, the subsequent imprisonment of Exall and the threats against his life, all these things culminating in Soto's actual and continued possession *of the Company's property after Exall's departure*—what could the Umpire do in face of all these things but decide that the Mexican Government was responsible in damages?

Suppose Exall's letters had been before him. So would Exall's explanation. Indeed, the very defense that these letters support was made before the Umpire, namely, the

[1] *Ibid.*, 132. [2] *Ibid.*, 129, in two places; 131, 133. [3] *Ibid.*, 185.

impecuniosity of the Company and the poverty of the ores. But would that have changed the fact that the local officials believed that the mines were rich and should be owned and operated by Mexicans? Or would it have altered one iota any illegal act of Olvera, Perez, or Soto? Their misconduct was proved beyond a doubt. So was the failure of the higher authorities to protect the Company in its legal rights.

Why was the Company short of money? It was potentially rich—its officers and stockholders could and would have advanced whatever was required for the development of its property, but protection for life, liberty, and capital was necessary. The new evidence shows—and would have shown to the Umpire—that the Company's capital had been exhausted by unexpected expenses, and that it was necessary to reorganize and bring in more money—a thing that is often done; a thing that was done several times by the Durango Company before its tunnel was completed. The plan of tunneling its mines, not La Abra alone, but La Luz and Rosario, had been in contemplation from the outset. It is recommended by Del Valle in a letter to Bartholow, giving an account of the previous yield of the mines and the character of the ore—a letter which belongs to the case and is on file among the papers in the Department of State, but for some reason has been left out of the transcript. This plan of tunneling, so as to get below the old workings, was never abandoned until the impossibility of continuing the work for lack of the necessary protection was apparent. The official orders of June and July—the spirit behind them that showed itself in Soto's seizure of the Guadalupe hacienda and the imprisonment of Exall by Perez, and the threats and menaces of Olvera—made it impossible either to raise more funds in New York or make a proper application of them at Tayoltita. If we had Exall's letter of June

11 to Garth or Garth's letter of September 30 to Exall—the former of which is not in the press-copy book and the latter of which was withheld by Granger—the situation would be clearer. But we do have, and the Umpire would have had, Exall's letter of July 13th and 14th, in which he says—"*the officials are getting daily more troublesome; their demands are all foolish and very unjust;*" and we do have Garth's letter of August 10th, in which he speaks of the possibility of abandoning the Company's enterprise and property, *because they "will not be protected in our (their) persons and rights in that country."* That letter concludes as follows:

> "If so, you must take all necessary and legal measures, by protest and otherwise, to secure our claim against the government." Mr. Rice, no doubt, will be of essential service to you in any measure of this sort, and we would advise you to consult freely with him.
>
> "The directors of our Company are trying to reorganize and to raise money to pay off the debts, and to prosecute the work anew if possible, but, I am constrained to say, with but little hope of success. Meantime you must get out all the means you can from the ores, cut down all expenses, keep out of debt, and do what you can to protect and preserve the property of the Company."[1]

It will be observed how significant this letter is in various ways. It corroborates the statement in Chavarria's testimony that he was employed by Rice as Exall's lawyer to appeal to the Governor of Durango; it shows that the Company intended to hold the Government of Mexico responsible for its acts and omissions; that measures were on foot for increasing the capital, and that the Company's instructions to its agent were *not to*

[1] Record, 286.

abandon, but to do his utmost "to protect and preserve the property of the Company."

But money could not be raised when protection was not assured. Garth's testimony on this point is significant:

> "Question. What effect, if any, did the statement in Exall's letters of July 13 and 14—that the officials were daily becoming more troublesome, and that their demands were foolish and unjust—have upon your efforts to raise money?
>
> "Answer. *They had the effect of preventing any further advances in that direction.*"[1]

Now, it seems from Exall's explanatory affidavit that when he saw, from the conduct of the local magistrates, that the expulsion of the Company was only a question of time, it occurred to him that through his friend, Granger, who was a British subject and had become a member of Soto's family, he could secure some advantage for himself by inducing the Company to abandon its property voluntarily, and so (he says) he began, in his correspondence with the home office, to exaggerate his necessities and depreciate the value of the property. Perhaps this may seem improbable, but human motives are mixed, and truth is sometimes found not on the surface, but at the bottom of the well. Now, the books that Mexico withheld for so many years show that Exall's statement in his explanatory affidavit is true; that he did represent that he was more in need of funds than he was. The books show that although he never received a dollar from the home office, he met the expenses of the Company's business, including nearly $3,000 in taking ore from La Abra mine alone, without running into debt. When he left Mexico he left the Company free

[1] Record, 733.

of debt in that country. He borrowed $250 in Mazatlan, but that was on his own account, and it is in evidence that the Company paid him every dollar it owed him. His statement in his letter of December 18 that he had to borrow $1,492 in Mazatlan was not true. He was concealing his receipts—receipts which appear in the account books. August 5, 1867, he wrote: "The returns I brought down from mint I brought down to E. P. & Co. to settle money borrowed from them to buy goods; their bills will be due next month, and most of returns from present run will have to be paid then. *I hope to be able to settle up all the indebtedness of the Co. both here* [Mazatlan] *and at the mines.* E. P. & Co. are the only ones I am owing here."[1]

In his next letter to Garth, copied in the impression book and dated 6th October, 1867, he says: "I was much disappointed that my urgent demands for money were not favorably answered." But he had made no such urgent demands, unless there is a missing letter between August 5 and October 6. He says: "I now have to urge you to send me means. I have heretofore been keeping above water by using the stock which I fortunately had on hand. *That is now entirely exhausted. I have neither money, stock, or credit.*" His next letter shows that his stock was not even then exhausted, and the account books show that in September he received $1,356 from the mint at Durango. Of this he says nothing, but he does say that by the last steamer (sailing about September 15) he "sent a full statement of business of hacienda—the *runnings, returns, and expenses of the mill,* account of ores," &c. There is no such statement in the letter book. In his next letter, 17th November, 1867, he says that "Cullins intends to commence suit in the

[1] Record, 273.

courts here for his year's salary," and that he is trying to get him to wait till the next mail in the hope of a remittance. He also says he has no money and that his stock is almost entirely exhausted. But the account books show that he received in November $923.16 from the mint at Durango.

In his next letter, 18th December, 1867, he said he had *borrowed* $1,492 at Mazatlan, out of which he had settled with Cullins. Now, he had said in his letter of 6th of October, that he had neither money, stock, nor *credit;* and, as already stated, he left no debt of the Company in Mazatlan. He also said that he was doing nothing at the mines, and had only one person left with him, but the account books show that in that month the mill was debited $563.09 for merchandise, in which the wages of the workmen in the mines as well as at the reducing works were paid.[1]

In his next letter, 24th January, 1868, he said he was being sued by agents of the Bank of California. But that was a falsehood. He also said that by the December steamer he had sent Garth a telegram from San Francisco, and that the parties to whom he had sent it in that city had sent it on to New York. *No such telegram or letter to anybody in San Francisco is copied in the letter book.* Garth testifies that he never received any such telegram, and that he had no recollection of receiving the letter of January 24th. He also testifies that if he had received any such letter he certainly would have answered it. We beg the court to read the whole of his testimony in regard to this letter, and especially in regard to the question in it, whether he was going to let the Company's interests in Mexico "go to the dogs."[2] There is something

[1] Record, 745; stipulation, paragraph 2.

[2] *Ibid.*, 706, 707.

very mysterious about that letter. It is one of those pasted into the book and, unlike all the other letters written at Mazatlan, it is dated more than a week later than the monthly sailing of the steamer from that port. It is not to be forgotten that the press-copy book was in Granger's hands for ten years before he delivered it to the Mexican government, and that before its delivery he had made a contract with that government, under which he was to receive the stipulated price, $3,500, only in case the evidence he furnished should entirely subvert the award. His handwriting was so like Exall's that the only witness who identified that of the latter confounded it with Granger's.[1]

If the letter-book had been before the Umpire he would have seen Exall's appeals in it for protection from Soto's illegal seizure of the Guadalupe hacienda, and from the disruption of the Company's business, which that magistrate's plan of operations entailed; and he would have had new and striking proof of collusion between the local authorities, making it impossible for the Company to continue its work. We beg the court to read Exall's letters of November 28 and December 5, 1867, to the prefect, Olvera, and his letter of the latter date to Mr. Del Valle. After stating his suspicions that the other authorities had committed themselves in some way in Soto's favor, and would do "*great* injustice" to the Company, besides violating the laws of the country, he said:

> "The reason of the statement given above in reference to committal, is, he Soto seems so confident of success, and in addition *has a force at work daily.* You know the great injury the putting up of tahonas by the above-named party would do my Company, as, of course, *all the metal from this Company's mines, and all the surrounding mines would be stolen and*

[1] Record, 177.

taken to him, and in fact, there are many other ways in which my Company would suffer if he succeeds in getting possession."[1]

Exall had previously written to Del Valle begging his assistance at Durango in this matter, but this earlier letter is not in the copy-book.

In his second letter to the prefect, Exall says:

> "On last Saturday Don Guadalupe *put men to work on the hacienda grounds;* this I was confident he had no right to do till decision was given in his favor, on his denouncement, and he was legally put in possession. Accordingly, I laid my complaint before the judge here (Don Nicanor Perez) *who decided that Soto must suspend work*, but afterwards I learned that *he told Soto to go to work, which he did, and has since continued working. This should and ought not to be* * * *. Soto contends *that he works by authority of an order received from you.*"[2]

Mr. Evarts, in his examination of the case, was doubtless impressed with this proof in the letter book that a Mexican magistrate could seize property of citizens of the United States in such a way, and, after his seizure had been pronounced illegal by the higher courts, continue in office and power. He might well hold that although the measure of damages, so far as the value of the ore on the "patio" was concerned, might be affected by the letter book, it strengthened rather than weakened Mexico's liability for the misconduct of her officers.

On a rehearing we can show that in other respects the letter book has the same tendency; *e. g.*, that De Lagnel's letter of June 6, 1866, to Clarke,[3] an important witness before the Commission, corroborates the latter's testimony, and, taken with the extracts from the Com-

[1] Record, 279. [2] Record, 278. [3] Record, 227.

pany's books,[1] shows conclusively that he made the payment stated by him for the release of one of the Company's supply trains. So, also, does De Lagnel's letter of November 17, 1866, in which, referring to a "change of rulers," he says:

> "One thing appears clear—that we will not have *to pay duty to Imperial customs and then do the same to the Liberal officers.*

We desire to be reheard on the relations which Granger sustained to Exall on the one hand and to the Mexican officials on the other, in view of the weight which the court attaches to the so-called "autograph letter" of February 26, 1868. It can be shown that several years before the award was rendered, and while the Company's claim was pending (and at stake) in the Commission, Granger tried to collect from the Company what it did not owe him, and, after having been defeated in a suit,[2] became its implacable enemy and entered into that unexampled agreement with the Mexican Government, which is described in the evidence, for the subversion of the award.[3] Granger was for sale and the Company refused to buy him, although its claim for such a large amount was pending undecided in the Commission.

Counsel is conscious of the extraordinary length of this petition, which perhaps is to be excused, if not justified, on account of the exceptional importance of the case and the impossibility of any adequate discussion of the facts in the time allowed for the oral argument in court.

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[1] *Ibid*, 753. [2] Report 2705, Senate, 50th Cong., 1st sess., 170.

[3] Record, 571–575.

The petition is respectfully submitted in the conviction that if a rehearing is granted, it will be shown to the satisfaction of the court that private right, as well as international justice, requires that the award should be carried out as provided in the treaty.

CRAMMOND KENNEDY,
Solicitor and of Counsel for the Appellant.

We, J. M. Wilson, John C. Fay, and E. I. Renick, of counsel with the Appellant, certify that we have examined the petition for a rehearing in this cause prepared by the Appellant's solicitor and counsel, and that we believe that it states grounds on which the cause should be reheard as prayed for in the petition.

J. M. WILSON,
JNO. C. FAY,
E. I. RENICK, *of Counsel.*

WASHINGTON, D. C., *February* 7, 1900.